

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-

76-730

WILLIAM T. ADKINS,

Petitioner,

v.

I. T. O. CORPORATION OF BALTIMORE and LIBERTY
MUTUAL INSURANCE COMPANY,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

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v.

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MUTUAL INSURANCE COMPANY,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on August 26, 1976.

Opinions Below

The opinions of the Court of Appeals on rehearing *in banc* ("Adkins II"), decided August 26, 1976, are not yet officially reported and appear at pages 1-16 of the Appendix hereto.* The opinions of the Court of Appeals panel which initially determined this case, issued on December 22, 1975, are reported at 529 F.2d 1080 ("Adkins I"). They appear at pages 17-61 of the Appendix. The underlying decision of the Benefits Review Board, Department of

* Pages of the Appendix are designated "App. (Page Nos.)."

Labor, dated November 29, 1974, affirming the Decision and Order of the Administrative Law Judge on March 26, 1974, allowing a claim for compensatory damages under the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §§ 901-950 ("the Act"), is reported at 1 BRBS 199. It appears at page 63 of the Appendix. The Decision and Order of the Administrative Law Judge ("ALJD") is unreported. It appears at page 68 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals following rehearing *in banc* was entered on August 26, 1976. This Petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a member of a longshore unit who is working in the final terminal phase of the movement of maritime cargo prior to its acceptance by the inland consignee, is "engaged in longshoring operations" within the meaning, as stated and intended by Congress, of Section 2(3) of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 902(3)?

2. If so, whether the legislative presumption in favor of a claim and judicial declarations favoring liberal construction of the Act, preclude disallowing the claim of a longshoreman injured while engaged in such operations, by reason alone of a hiatus in the movement of the cargo while it is still under the jurisdiction, responsibility and control of the maritime carrier and its agents?

Statutes Involved

The pertinent provisions of the Act, as amended in 1972, are as follows:

Section 2(3), 33 U.S.C. § 902(3):

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 3(a) of the Act, 33 U.S.C. § 903(a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). . . .

Section 20, 33 U.S.C. § 920 (*Presumptions*):

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter. * * *

Statement of the Case

Petitioner, William T. Adkins ("Adkins"), is a member of Local 333, International Longshoremen's Association, AFL-CIO ("ILA") with 11 years employment on the waterfront. He is an employee of I.T.O. Corporation of Baltimore ("ITO"), a contract stevedore and terminal

operator. ITO was under contract to United States Lines, Inc. ("U.S. Lines") to provide services attendant to the movement of cargo at the Dundalk Marine Terminal, Baltimore, Maryland, prior to and following its transportation aboard U.S. Lines' vessels. ITO hires longshore labor through the ILA dispatch center to physically perform its various services.

On March 2, 1973, a container* "stuffed" with cases of brass tubing was discharged from a U.S. Lines vessel, the S.S. American Legend.** The relevant shipping documents indicated that the container was not to be delivered intact to the inland consignee. Rather, the container was to be "stripped" at the waterfront terminal and only the cargo was to be delivered to the consignee or its delivery agent who would pick it up at the terminal. The stripping process was to occur at shed #11, a consolidation shed operated by ITO and located on the terminal premises approximately 685 feet from the water's edge. Inasmuch as inbound containers are often unloaded in large numbers at a time, they must often await their turn to be processed at shed #11, whose facilities are limited.

Terminal shed #11 is a location inside the Marine Terminal where numerous outbound pieces of loose (non-unitized) cargo are initially received by the vessel carrier from various consignors. Longshore unit employees such as Adkins, along with ILA checkers, sort the non-unitized cargo by destination. The cargo is then stuffed into con-

* Sealable, metal box-like enclosures of varying sizes for shipment of large single or numerous less-bulky items.

** "Stuffing" is the process of loading cargo into a container; "stripping" is the process of removing cargo from a container. Longshoremen traditionally have performed this function at piers and terminals in ports on the East and Gulf Coasts of the United States. See petitions in *International Longshoremen's Association v. National Labor Relations Board, et al* and *New York Shipping Association, Inc. v. N.L.R.B., et al.*, U.S. Nos. 76-570, 76-569 (filed Oct. 22, 1976). See also ALJD, App. 77-78.

tainers which eventually are placed aboard U.S. Lines vessels, all this work being performed by longshore unit members represented by the ILA. Terminal shed #11 is also a situs where U.S. Lines delivers in(land)bound non-unitized cargoes to the consignees or, as in the instant case, to their truckmen. Adkins thus was engaged in performing miscellaneous operations on *both* inbound and outbound cargoes.* See ALJD, App. 71 (No. 13).

The abovementioned container housing the brass tubing was hauled to the terminal yard (a/k/a "marshaling yard") beyond shed #11 where it remained for three days. It was then moved by a tractor device, known as a "hustler", to shed #11 and was backed up to an apron at an open door at which time it was stripped. The cargo remained in the shed to await its delivery to the consignee.

The consignee's truckman arrived on March 9, 1973 to pick up the cargo. Adkins, together with an ILA checker, was assigned to load the cases from the shed onto the truckman's flatbed truck. In the course of operating a fork-lift tractor, one of the nearby cases fell and struck Adkins, fracturing his right leg and injuring his back. As a result, he required extensive treatment and was out of work for a substantial period of time. App. 72 (No. 16).

Adkins initially filed for compensation with the Workmen's Compensation Commission of the State of Maryland. He subsequently abandoned his claim for State compensation and filed a claim with the Federal Office of Workers' Compensation Programs in order to obtain the greater benefits which became available to longshore personnel under the 1972 Amendments to the Act.

The Department of Labor's Administrative Law Judge and thereafter its Benefits Review Board ("the Board")

* Non-stripped containers are delivered intact to a trucking company for the consignee or for a warehouse outside the Marine Oct. 22, 1976).

sustained Adkin's claim for benefits. They found that the functions performed by Adkins and his fellow employees in the terminal shed were the first and last tasks in a series of longshoring operations in the movement of ocean cargo. They therefore determined that the place of injury was "upon navigable waters of the United States," as that term is defined in the Act, and that Adkins was an employee engaged in a function within the scope of "maritime employment" under the Act.

ITO and its insurer, Liberty Mutual Insurance Company, appealed the Board's determination to the United States Court of Appeals for the Fourth Circuit. That Court initially considered the instant case together with two other cases arising under the Act, *Marine Terminals, Inc. and Aetna Casualty and Surety Co. v. Secretary of Labor and Donald D. Brown* (Docket No. 75-1075, Fourth Circuit, 1975) and *Maritime Terminals, Inc. and Aetna Casualty and Surety Co. v. Vernie Lee Harris and United States Department of Labor* (Docket No. 75-1196, Fourth Circuit, 1975). The majority of the three-judge reviewing panel resorted to the legislative history of the amendments to overturn the Board's decisions favoring all three claimants, by creating and applying a shifting "point of rest" criterion for relief. It found that Brown, who was injured in a similar terminal shed in Norfolk, Virginia in the process of stuffing a container, and Harris, who was injured in Norfolk while driving a hustler hauling a container—both on *outbound* shipments—were claiming benefits that occurred prior to the last point of rest (i.e., the marshaling area adjacent to the pier) in the loading process; and that Adkins was injured land-ward of the first point of rest in the vessel unloading process (i.e., the terminal yard). Though they were found to have met the Act's "situs" test, 33 U.S.C. § 903(a), they were not found to be "employees" within the meaning of the Act. App. 31-32.

Judge Craven, dissenting, unlike the majority experienced no difficulty in defining "maritime employment" under the Act. He looked to (a) the "plain language of the statute"; (b) the statutory presumption and the rules of statutory construction of this Act favoring claims; (c) the consistency of administrative interpretations of the Act in upholding these and similar claims; and (d) the essential characteristics of maritime cargo. App. 38-40, 42-45, 52. He rejected the majority's "point of rest" theory as untenable in the context of longshore terminal operations, and concluded that all three employees were engaged in "maritime employment" at the times of their injuries.

On rehearing *in banc*, four of the six sitting judges reversed the panel majority and granted relief to Brown and Harris, while sustaining the earlier decision with respect to Adkins. Chief Judge Haynsworth and Judges Russell and Winter subscribed to the views expressed by the majority in the original decision. In Judge Widener's view, though agreeing in principle with them, he further modified their "point of rest" standard. He considered Harris and Brown to be covered employees, inasmuch as they were engaged in the "overall process of loading the ship". He denied relief to Adkins because he was not participating in the unloading process. He reasoned that the cargo, having been stored "for convenience or facility", thereby no longer was being unloaded from the ship but rather was in the process of being loaded into a delivery truck for "transshipment." Judge Craven, joined by Judge Butzner, maintained his earlier position in dissent.*

* The issue and contentions regarding the status of the Director, Office of Workers' Compensation Programs, Department of Labor, as a proper respondent in both proceedings before the Court of Appeals was treated and determined in both Adkins I and II. Petitioner does not deem the resolution of that issue as essential to the Court's deliberations on the instant Petition for a Writ of Certiorari.

Reasons for Granting the Writ

1. **The Decision Below Directly Conflicts With a More Recent Decision in the Fifth Circuit and in Principle With Decisions in the First and Second Circuits, Warranting Timely Clarification of Important, Far-Reaching Legislation.**

The Court already has before it Petitions for Writs of Certiorari to the United States Courts of Appeals for the First and Second Circuits in *John T. Clark & Son of Boston, Inc. and American Mutual Liability Insurance Co. v. John A. Stockman and Director, Office of Workers' Compensation Programs, United States Department of Labor* (U.S. No. 76-571); *Northeast Marine Terminal Company, Incorporated, and State Insurance Fund v. Ralph Caputo and Director, Office of Workers' Compensation Programs, United States Department of Labor* (U.S. No. 76-444); *International Terminal Operating Co., Inc. v. Carmelo Blundo and Director, Office of Workers' Compensation Programs, United States Department of Labor* (U.S. No. 76-454). Each of those employer/insurer petitioners seeks to overturn appellate decisions which sustained the Benefits Review Board's findings that the terminal employees therein were covered under the Act. This Petitioner necessarily disagrees with their contentions respecting the ultimate outcome of the merits in those cases. Nevertheless, he concurs with their conclusions and with those of the Courts in the related cases whose opinions they cite, to the effect that there is an urgent, practical need for resolution by this Court of the conflicting decisions on the important and recurring question of the proper interpretation of coverage under the 1972 amendments to the Act.*

The conflicts and confusion engendered by the majority and dissenting opinions in these and other interpretative

* See, e.g., *Caputo* Petition at pp. 4-6; *Blundo* Petition at pp. 8-10.

cases are adequately discussed in the *Blundo* Petition at pp. 12-19 (second paragraph). Moreover, the Solicitor General, in his Memorandum for the Federal Respondent in the *Caputo* case, recognizes that

"[t]his conflict among the Circuits is undesirable. It has created uncertainty, and uncertainty has led to a flood of litigation. . . . The Act is designed to be self-administering in most cases, but this has become impossible in the light of prevailing uncertainties concerning the extent of the Act's coverage." (*Caputo* Memorandum at pp. 6-7)

The Solicitor General repeatedly suggests that *Caputo* is an excellent case for resolution of the conflicts between the Circuits concerning the scope of shore-side coverage under the amended Act. *Caputo* Memorandum at p. 7; *Blundo-Stockman* Memorandum at p. 2. He therefore recommends that a Writ of Certiorari be granted in *Caputo* and that consideration of *Blundo* and *Stockman* be deferred pending this Court's disposition of *Caputo*. *Blundo-Stockman* Memorandum at p. 3.

This petitioner respectfully suggests that the instant case presents an even more compelling vehicle for review. Whether in the immediate context of the opinions below or in juxtaposition to another case in which a petition was recently filed with the Court, *Jacksonville Shipyard, Inc. v. Perdue*, 539 F.2d 533, 543 (Fifth Circuit, September 27, 1976; No. 75-2289, *Diverson Ford*), Pet. for Writ of Cert. filed *sub nom. P. C. Pfeiffer Co. v. Ford* (U.S. No. 76-641, docketed Nov. 8, 1976), *Adkins* poses a more direct and unqualified conflict, not only of results but of rationale as well, than exists between the opinions in *Caputo*. In *Ford*, as in *Caputo* and *Adkins*, there was a hiatus in time between deposit of the maritime cargo *preparatory* to delivery to the consignee and the final step in *effectuating* such delivery by its transfer to the consignee. However, the Fifth Circuit in *Ford* specifically rejected the "point of

rest" analysis in the majority opinions below, agreeing in principle with dissenting Judge Craven that it is neither to be found in the statute itself nor in the legislative history of the Act. App. 48-51; 539 F. 2d 540, 543. And unlike the Second Circuit in *Caputo*, the Fifth Circuit did not fashion any requirements for *Ford* to establish, as well, that he had spent a significant part of his time loading or unloading vessels. *Ibid.*; Appendix, *Caputo* Petition at 42a.

In view of the clear-cut conflicts between *Adkins*, *Ford* and *Caputo*, all of which are now before the Court on Petitions for Writs of Certiorari; of the comprehensive opinions in *Adkins I* below, which articulate the respective positions not only of the Fourth Circuit alone, but as well of the fundamental issues of interpretation, application and coverage in all of the cases now or prospectively pending before this Court on similar petitions;* and of the repeated references, by contrast, to *Adkins* in all of the petitions heretofore filed with the Court, we commend the instant case as most opportune and pivotal for this Court's consideration of the essentially common theme in all of the pending cases.

Petitioner further notes that the close division of the Court in *Adkins II* was created by Judge Widener's seeming inconsistent injection of the additional criteria of "convenience" to his colleagues' insertion of the transitory "point of rest" rule. These judicially-established requisites are neither measured nor even mentioned in the statute or in the legislative history, nor are they determinative in any of the other pending cases.

Accordingly, deference to *Caputo*, as suggested by the Solicitor General, will not resolve *Adkins*. Assuming, *arguendo*, that the Court agrees with the consonant urging of all petitioners, that the issues and conflicts in interpreting and applying the revised Act warrant review by this Court,

* By the time of filing of this Petition the Court should have before it petitions of the respondents in *Brown* and *Harris*.

we respectfully submit that a Writ of Certiorari should issue to the Fourth Circuit below, whether separately or simultaneous with Writs to that Court or to the other Courts of Appeals respecting any one or more of the above-mentioned related cases.

2. The Fourth Circuit Court of Appeals Has Given a Strained and Over-Restrictive Interpretation to a Remedial Statute. It Has Departed From the Dictates of the Statute Itself as Well as From the Admonitions of This and Other Courts to Render Interpretations in Favor of Claims. This Situation Calls for an Exercise of this Court's Supervisory Powers.

As stated by Judge Craven in his dissenting opinion in *Adkins I*,

" . . . the 1972 amendments to the Act are of a remedial nature, designed to correct inequities worked by the Act prior to its amendments. With this in mind, we should be guided by a uniform line of cases holding that the Longshoremen's and Harborworkers' Compensation Act should be liberally construed in light of its remedial nature and humanitarian purpose. See, e.g., *Reed v. Steamship Yaka*, 373 U.S. 410 (1963), rehearing denied, 375 U.S. 872 (1963); *Voris v. Eikel*, 346 U.S. 328 (1953); *Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1951); *Nalco Chemical Corp. v. Shea*, 419 F. 2d 572 (Fifth Cir., 1969); *Calbeck v. A. D. Suderman Stevedoring Co.*, 290 F. 2d 308 (Fifth Cir., 1961); *Old Dominion Stevedoring Corp. v. O'Hearne*, 218 F. 2d 651 (Fourth Cir., 1955); *Blackwell Construction Co. v. Garrell*, 352 F. Supp. 192 (D.D.C. 1972); *Page Communications Engineers Inc. v. Arrien*, 315 F. Supp. 569 (E.D.Pa., 1970); *Holland America Insurance Co. v. Rogers*, 313 F. Supp. 314 (N.D. Cal. 1970); *Gibson v. Hughes*, 192 F. Supp. 571 (S.D.N.Y., 1961)." (App. 38-39)

In amending the Act in 1972, Congress obviously had these interpretive prescriptions in mind, inasmuch as it retained intact Section 20 of the Act, 33 U.S.C. § 920, whereby in *any* proceeding for enforcement of a claim for compensation, the adjudicating authority must presume "in the absence of substantial evidence to the contrary" that the claim comes within the provisions of the Act. *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 474 (1947); *Overseas African Construction Corp. v. McMullen*, 500 F. 2d 1291 (2 Cir., 1974). See also *Davis v. the Department of Labor*, 317 U.S. 249, 256 (1942).

The majority in *Adkins II* delineated two separate, amorphous and non-existent lines of demarcation between *Brown* and *Harris* on the one hand, and *Adkins* on the other, notwithstanding that all three longshoremen were variously engaged in the handling of maritime cargo. That cargo did not lose its identity as such while it was under the control of the maritime carrier and its agent before it was finally turned over to the jurisdiction of the consignee or its agent. Though *Adkins* was denied relief while engaged in part of the "overall (inbound) process" of unloading a ship, the newly-critical factors ostensibly created by the divided majority would not apply equally to an outbound movement of identical cargo in the "overall process" of loading a ship. See discussion of the *Brown* and *Harris* cases (App. 5-6) and *Perdue, supra*, at 544 (No. 75-4112, *Will Bryant*), Pet. for Writ of Cert. filed *sub nom. Ayers Steamship Co. v. Bryant* (U.S. No. 76-641, docketed Nov. 8, 1976). In such circumstances, it can hardly be said that there is "substantial evidence to the contrary." The statutory presumption remained dominant, yet was ignored.

We respectfully submit that what actually is at stake transcends the resolution of *Adkins*' claim. This Court, in *Voris, supra*, 364 U.S. at 333, declared that "[t]his Act must be liberally construed in accordance with its purpose, and in a way which avoids harsh and incongruous results", citing *Baltimore & P.S.B. Co. v. Norton*, 284 U.S. 408, 414,

76 L. ed. 366, 369, 52 S. Ct. 187. If restrictive and irrational interpretations of the statute—contrary to the legislative and judicial intent—of the majority opinions below are permitted to stand in *Adkins*' case, then the fictional and peripatetic "point of rest", "time" and "convenience" factors will appear to be valid. They will be used by this and other Courts of Appeals in reviewing the numerous Benefits Review Board decisions now pending before them, which are growing in numbers at an alarming rate. See *Blundo* Petition, pp. 10-11, at footnote 7. The result will be harsh and unequal treatment of members of the identical longshore unit while engaged in miscellaneous phases in the movement of the identical piece of maritime cargo, whose identical injuries are caused by the sudden shifting of that same piece of cargo.* Indeed, such incongruous results could befall the very same individual, whose entitlement to compensation is fatefully determined by the fortuitous circumstance of an event (e.g., requirement for temporary storage pending arrival of consignee for transshipment) which he, and his employer, cannot anticipate or control.**

* The Solicitor General claims that *Caputo* was engaged in the longshore function most remote from the unloading of the vessel proper. Yet, it is evident that if a longshoreman were injured in the more distant terminal yard while bringing the container here involved to shed #11, he *would* be covered under Judge Widener's reasoning.

** The Fifth Circuit in *Perdue*, in accord with the Second Circuit in *Caputo*, perceptively pointed out that it would be wholly artificial—and create an injustice—if the respective longshoremen would be denied coverage simply because of an interruption in time created by the cargoes having been temporarily stored. Both longshoremen admittedly would be covered under the Act were they engaged at the time of their injuries in other work at the same situs of their injuries as part of a continuous operation between the vessel (or pier) and delivery to the consignee's vehicle for inland transshipment. *Perdue, supra*, 539 F. 2d at 543; *Caputo* (unreported) at p. 39a of the Appendix to the *Caputo* Petition. For example, if *Adkins*, employed generally in shed #11 (See pp. 4-5, *supra*) had been injured in the process of stripping the cases of tubing from the container, or, like *Brown*, while stuffing an outbound container, this petition would be avoided. See ALJD, App. 76, 78 (Second Paragraph).

It is beyond question that Congress intended to eliminate the differences in compensation coverages for injuries suffered in the longshore handling of cargo transported by vessels, where such incidents occur on shore rather than on ship.* Yet, the essence of that distinction ironically will persist under the rationale of the decisions below. Rather than to create a uniform, readily-applicable policy and guideline for administrative application, the reviewing agency and Courts of Appeals will be required, under the theories propounded below, to continue to strain under the facts of each and every case, in deciding whether any particular claimant is or is not covered. This will lead to more than a mere proliferation of litigation. It evinces an erroneous and unrealistic understanding of the process of longshore operations *and* of the purposes behind the 1972 amendments. It effectively nullifies what Congress set out to accomplish, in the scheme of which Adkins' situation is the example that should prove the rule.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges the Court to grant a Writ of Certiorari herein.

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* See ALJD's quotation from p. 75, Legislative History of the 1972 Amendments to the Act at App. 76.

APPENDIX

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT SITTING IN BANC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1051

I.T.O. Corporation of Baltimore, Employer, and
Liberty Mutual Insurance Company, Carrier,
Petitioners,

v.

Benefits Review Board, U.S. Department of Labor,
Respondent,

William T. Adkins,
Respondent,

International Longshoreman's Association,
Amicus Curiae.

App. 2

No. 75-1075

Maritime Terminals, Inc., and
Aetna Casualty and Surety Co.,
Petitioners,

v.

Secretary of Labor, and Donald D. Brown,
Respondents.

No. 75-1196

Maritime Terminals, Inc., and
Aetna Casualty and Surety Co.,
Petitioners,

v.

Vernie Lee Harris, and
United States Department of Labor,
Respondents.

App. 3

No. 75-1088

National Association of Stevedores, et al.,
Petitioners,

v.

Benefits Review Board, U.S. Dept. of Labor,
Respondent,
William T. Adkins,
Respondent.

On Rehearing In Banc.

Argued May 4, 1976

Decided Aug. 26, 1976

Before Haynsworth, Chief Judge, Winter, Craven, Butzner,
Russell and Widener, in banc.

* * *

Winter, Circuit Judge:

These consolidated appeals present two major questions:
(1) the extent of coverage of the 1972 Amendments to the
Longshoremen's and Harbor Workers' Compensation Act,
33 U.S.C. §§ 901 *et seq.* (sometimes "LHWCA"), to per-
sons engaged in the necessary steps in the overall process of

*see 44 LW 2347
for original
CA 4
opinion*

loading and unloading a vessel but who, prior to the Amendments, could claim benefits for accidental injury or death, sustained in the process, only under state law; and (2) whether, in a petition for review under 33 U.S.C. § 921(c), the Director, Office of Workers Compensation Programs, Department of Labor, is a proper respondent. The appeals were first heard and decided by a divided panel of the court. *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4 Cir. 1975). Chief Judge Haynsworth and I comprising the majority, held that during the loading and unloading process the coverage of the Act extended to the first (last) point of rest. As applied to the facts, this holding resulted in the conclusion that none of the three claimants was entitled to benefits. Judge Craven was of a contrary view. He would have held that the three claimants were engaged in maritime employment on navigable waters of the United States, as defined in the Act, and hence they should be entitled to benefits under the Act for their accidental injuries. The panel was unanimous in deciding that the Director was not a proper respondent, although it was recognized that, in a proper case, he might be permitted to become an intervenor.

Because of the importance and novelty of the questions decided, the entire court granted cross-petitions for rehearing and reheard the appeals in banc. At the time the appeals were reargued, the in banc court consisted of six judges.

I.

On the issue of the extent of the Act's coverage, Chief Judge Haynsworth, Judge Russell and I subscribe to the views expressed in the majority panel decision. Judge Widener subscribes to the principle expressed in that opin-

ion, although he defines the exact point between coverage and non-coverage somewhat differently.

In his application of the principle, Judge Widener concludes that the claimant Adkins is not covered by the Act, but that claimants Brown and Harris are covered. He reasons that the test of coverage is whether an otherwise eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship. In Adkins' case, a container was removed from the ship and stored in the marshaling area. From there the container was moved to a shed where it was stripped and the contents were stored. Adkins was injured when he was moving the contents from the storage area onto a waiting delivery truck. The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins, in Judge Widener's view, was thus not covered because he was not participating in the unloading process; he was handling the goods for transshipment. Accordingly, Judge Widener concurs in the judgment of Chief Judge Haynsworth, Judge Russell and me to reverse Adkins' award.

In Brown's case, the cargo was brought from somewhere inland and deposited in a warehouse. Brown, operating a forklift, picked up cargo and stuffed it into a container. While stuffing the container, Brown was injured. When the stuffing would have been completed, a hustler would have carried the container to the marshaling area, and from there the container would have been taken to the pier to be loaded on board. Thus, in Judge Widener's view, Brown was engaged in the overall process of loading the ship. The cargo was not merely being moved to storage for convenience or facility; the cargo was in the process of being loaded on

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board ship, and Brown was engaged in the loading process. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Brown.

Harris was a hustler who was injured while he was taking a container, stuffed with goods which had been stored after inland delivery, from the stuffing area to the marshaling area. From the marshaling area, the container would have been taken to the pier where it would have been loaded on board. The goods were being moved solely for loading purposes, not for mere convenience, and therefore, in Judge Widener's view, Harris, like Brown, was engaged in the overall process of loading the ship. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Harris.

Judge Craven and Judge Butzner subscribe to the views expressed by Judge Craven in his dissenting panel opinion, and for those reasons and the additional reasons expressed by Judge Butzner in his separate opinion attached hereto, they vote to affirm the awards made to Adkins, Brown and Harris.

By the majority votes of Chief Judge Haynsworth, Judge Russell, Judge Widener and me, the award to Adkins (Nos. 75-1051 and 75-1088) is reversed. By an equally divided court, the awards to Brown and Harris (Nos. 75-1075 and 75-1196) are affirmed.

II.

On the issue of whether the director is a proper respondent, an issue raised only in Nos. 75-1051 and 75-1088, Chief Judge Haynsworth, Judge Russell, Judge Widener and I subscribe to the views expressed in the majority panel decision as hereafter amplified. Judge Craven and Judge

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Butzner subscribe to the views expressed in Judge Butzner's separate opinion attached hereto.

III.

Chief Judge Haynsworth, Judge Russell, Judge Widener and I amplify our conclusion that the Director is not a proper respondent as follows:

Prior to the 1972 Amendments, the Act provided for judicial review by an injunction suit against the deputy commissioner making a compensation award. The pertinent part of 33 U.S.C. § 921(b) (1970), *as amended*, 33 U.S.C. § 921(c) (1976 Supp.), provided:

If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in . . . the judicial district in which the injury occurred

One of the 1972 Amendments revised § 921 so that subsection (c), the counterpart of the previous subsection (b), now provides:

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court . . . a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted . . . to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings

Certainly the deputy director was a party to pre-1972 litigation, but neither he nor his counterparts is expressly designated as a party by the 1972 Amendments. The legislative history is unenlightening as to the reason for this omission. While it is true that old § 921a¹ provided that the United States Attorney would represent the Secretary or the Deputy Commissioner in any court proceedings under old § 921, and that § 921a was continued by the 1972 Amendments although modified to permit the Secretary to appoint his own counsel,² the legislative history is again unenlightening. To conclude from the mere existence of new § 921a that the Secretary, or his designee, the Director, is automatically a party to a review proceeding is to beg the question. This section's existence can as well mean only that if otherwise made a party, *e.g.*, by intervention in a review proceeding, the Secretary or Director will be represented by attorneys appointed by him.

Indeed, § 939(c)(1), added by the 1972 Amendments, suggests the latter reading. It provides that "[t]he Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim." It would be a redundancy for the Secretary to be authorized

¹ 33 U.S.C. § 921a, *as amended*, 33 U.S.C. § 921a (1976 Supp.):

In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal.

² 33 U.S.C. § 921a (1976 Supp.):

Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

to provide legal services to a prevailing claimant if the Secretary himself was intended actively to litigate to sustain an award.³ Thus, unlike the pre-1972 Act and numerous other laws providing for judicial review or orders of administrative agencies,⁴ the LHWCA, as amended in 1972,

³ We fail to understand how the Director's statutory duty to provide legal assistance to claimants confers upon him a stake in the proceedings independent of that of any claimant, as apparently urged by the dissent. The issue we confront is not whether the Director may appear before us as Adkins' representative, but whether the Director may participate in his own behalf.

We also note that we find nothing in the statute or its legislative history to indicate that the availability of legal assistance to claimants may be made to turn upon whether the Director agrees or disagrees with the decision which a claimant seeks to appeal, as the dissent appears to suggest, *infra*, slip opinion at 20 ("If he deems the decision erroneous, his statutory duty to assist the claimant includes seeking review.").

⁴ Most other statutes providing for judicial review of agency action are simply not analogous to the LHWCA because under them true adversity exists between the claimant of a government benefit and the government agency which seeks to withhold it. Thus, when review of agency action is sought by an unsuccessful applicant for a license before the FCC, *see* 47 U.S.C. § 402, or an unsuccessful applicant for a rate increase before the FPC, *see* 16 U.S.C. § 825l(b), or an unsuccessful claimant for Supplemental Security Income before the Secretary of H.E.W., *see* 42 U.S.C. §§ 405(b), 1383(c)(3), it is clear that the agency must be named a respondent since it is the party against whom relief is sought; the court could not grant an effective remedy without its presence. (Conversely, these agencies would never have reason to seek review of their own decisions.) In LHWCA cases, on the other hand, it is the private employer or insurance carrier which will have to pay any award which may be entered.

The Labor-Management Relations Act is more nearly similar to the LHWCA, since under it, as under the LHWCA, disputes are adjudicated between antagonistic private parties. And the NLRB may be called upon to defend its decisions in court. *See* 29 U.S.C. § 160(f). However, the NLRB's status as a party in the courts of appeals derives from its enforcement powers. *See id.* ("Upon the filing of such petition [for review], the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section [granting the Board power to enforce its decisions in court], and shall have the same jurisdiction . . . to make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the

does not on its face make the director a respondent to a petition to review under § 921(c).

Since the Act is not specific, it follows that, if the Director is to be a party, he must be a "person adversely affected or aggrieved by a final order of the Board" within the meaning of § 921(c). Whether he is or is not is a question closely akin to the issue of whether the "case or controversy" requirement of Article III of the Constitution has been met.

Generally, to be adversely affected or aggrieved under the statute or to present a case or controversy under the Constitution, one must have suffered "injury in fact, economic or otherwise." *See* K. Davis, *Administrative Law* (1970 Supp.) § 22.00-1 at 706; 3 *id.* § 22.02. Therefore, to be a party before this court, the Director must have some concrete stake in the outcome of the case.

The Director asserts he has the requisite stake because

[h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged as the designee of the Secretary of Labor.

The Secretary of Labor's administrative duties, delegated to the Director, *see* 20 C.F.R. § 701.202, are set out in 33

order of the Board"). Thus, like the FCC, the FPC, the Secretary of H.E.W. and other agencies, the NLRB is an adverse party in court because adjudication is being sought of *its* right to grant relief in behalf of the prevailing party before it. The Director, Office of Workmen's Compensation Programs has no enforcement powers comparable to those of the NLRB.

Moreover, it is not the decision of the Director which is called into question by a petition for review under 33 U.S.C. § 921(c), but that of the Benefits Review Board. Thus, the Director does not possess even a concrete interest in defending his *own* decision in court, as does, for example, a district judge against whom a writ of mandamus is sought. As we noted in the majority panel opinion, the Benefits Review Board has specifically asked that it *not* be denominated a party respondent in these proceedings. To that request, we acceded.

U.S.C. § 939. Subsection (c)(1) is most arguably relevant to the Director's stake in the Board's decisions:

The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

But we do not think that these duties provide the requisite stake. They do not confer upon the Director any specific interest in the proper administration of the Act.

In *United States ex rel. Chapman v. F.P.C.*, 191 F.2d 796, 799-800 (4 Cir. 1951), *rev'd*, 345 U.S. 153 (1953), we held that the Secretary of the Interior lacked standing to challenge an order granting a license to a private company to construct a dam. The Secretary claimed to be affected by the order because it was his statutory duty to market surplus electrical power from publicly constructed dams. The Supreme Court reversed without opinion on this point, upholding standing. 345 U.S. at 156. *See* 3 K. Davis, *supra*, § 22.15 at 280.

The Director asserts that *Chapman* supports his position before us, but we disagree. The Secretary of the Interior in *Chapman* *did* have some stake in the outcome: it would have been harder for him to market public power if another private dam was built. Alternatively, if the private project was disapproved, it would have been more likely that a

public dam would eventually have been built, in which case the Secretary would have had more power to market. Thus, regardless of whether the Secretary was faced with a surplus or a shortage of electrical power to market under his statutory authority, the FPC's decision would directly affect him in the performance of his marketing obligations. The Director in this case has no such specific interest. Therefore, we read *Chapman* to suggest that the Director does not have a stake in the outcome and cannot be a party.

The lack of a stake in the outcome on the part of the Director would appear to end our inquiry. The Director argues, however, that because he is a party to proceedings before the Board, 20 C.F.R. § 801.2(10), it would be anomalous if he were not a party before this court. There are several answers to this argument. First, of course, that the Director is a party to proceedings before the Board does not alter the fact that he has no direct stake in the outcome of the case, is not a person aggrieved by Board action and is thus without a case or controversy to assert. Second, the fact that one is permitted to be a party to administrative proceedings does not require that one be entitled to initiate judicial review of those proceedings:⁵ in the former case,

⁵ While the Director here seeks to be named a *respondent* to a petition for review, a holding that he is a "person aggrieved" whose presence insures proper adversity would necessarily lead to the conclusion that he is entitled to petition for review of a decision of the Benefits Review Board of which he disapproves: if the Director has an interest in sustaining a Board decision with which he agrees, then he also has an interest in overturning a decision with which he disagrees. We would not readily subject the LHWCA to a construction under which the official charged with administering the Act could invoke the aid of the federal courts to reverse the decision of the board responsible for adjudicating claims under the Act. The unfairness of such a result is manifest if one contemplates the possibility that in some future case the Director, in furtherance of his asserted interest in determining "the proper scope of coverage of the Act," might seek to reverse an award to a claimant on the ground that the Board had been too generous.

the participant may perform a useful role by calling to the administrative agency's attention considerations it could not on its own initiative, much in the way that an intervenor would in this court; in the latter situation, however, the hopeful party is seeking to initiate a new level of proceedings because of dissatisfaction with the result below. See 3 K. Davis, *supra*, § 22.08 at 242.

Finally, it would appear even from the regulations implementing the Act that the Director is not *automatically* to be a party in this court, even though he is automatically a party before the Board. In 20 C.F.R. § 801.2(10), "party" is defined as follows: "the Secretary or his designee *and* any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken." (Emphasis added.) However, 20 C.F.R. § 802.410 provides: "any *party* adversely affected or aggrieved by such decision [of the Board] may take an appeal to the U.S. Court of Appeals" (Emphasis added.) Thus, the Secretary is a "party" before the Board even if he is not "aggrieved"; but to be entitled to participate in court proceedings, the Secretary, although a "party" below, must, like any other "party," be adversely affected.

In summary, we stand firm in our conclusion that the Director is not automatically a respondent in a review proceeding under § 921(c).

In our earlier opinion, we added that we did not decide that "a court of appeals may not, in a proper case, permit intervention by others [including the Director] who have an interest at stake" We elaborate on that comment: The Director unquestionably has a right to seek to intervene under Rule 24(b), Fed. R. Civ. P.,⁶ and an application

⁶ The Federal Rules of Civil Procedure principally govern procedure in the United States district courts in suits of a civil nature, Rule 1, but Rule 81(c) makes them applicable also to review proceedings under the Act to the extent that the Act does not prescribe procedure.

will ordinarily be granted. See 3B J. Moore, Federal Practice ¶ 24.10[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1912. The Director has not, however, sought intervention in these cases. We assume that he has not done so because he does not wish to render moot his assertion that such a request on his part is unnecessary. Having decided that such a request is necessary, we will still consider such a request on his part should he be advised to make it.

Nos. 75-1051 and 75-1088—REVERSED.
Nos. 75-1075 and 75-1196—AFFIRMED.
Each Party to Pay His Own Costs.

Butzner, Circuit Judge, dissenting:

I

I believe that the Director, Office of Workmen's Compensation Programs, should be recognized as a party to these proceedings. This issue raises a simple question of statutory construction. In 33 U.S.C. § 939(c), Congress authorized the Secretary of Labor to assist claimants and to provide them legal assistance. This statute must be read along with 33 U.S.C. § 921(a), which provides that attorneys appointed by the Secretary shall represent him before the courts of appeals. The Secretary has properly delegated his responsibilities to the Director.

Regulations under the Act establish the Director as a party before the Benefits Review Board, 20 C.F.R. § 801.3 (10). His stake in the proceedings arises out of the duty imposed by 33 U.S.C. § 939(c) (1) to assist claimants. Thus, the Director, like any other party before the Board, is aggrieved within the meaning of 33 U.S.C. § 921(c) by an adverse decision of the Board. If he deems the decision

erroneous, his statutory duty to assist the claimant includes seeking review. If the decision favors the claimant, the statute authorizes the Director to support the award on review.

In sum, the Act expressly places on the Secretary or his designee, the Director—not upon the courts of appeals—the responsibility of determining when the Director should participate in the review of the Board's orders. Congress did not condition the Director's appearance in our court on our granting or withholding permission.

The difference between the Director's status as a permissive intervenor and as a party is more than a technical nicety. The majority rule, as I see it, will create roadblocks to filing petitions for review and certiorari, and it will provoke extended litigation over whether the Director's position in a given case satisfies the requirements of Rule 24(b). Other circuits have wisely recognized the Director's status as a party. *See, e.g., Pittston Stevedoring Corp. v. Dellaventura*, No. 76-4042 (2d Cir. March 16, 1976); *McCord v. Cephas*, No. 74-1948 (D.C. Cir. March 25, 1975). I am not persuaded that we should differ from their sound conclusions.

II

I fully agree with Judge Craven that the point of rest theory espoused by the majority of the court is a judicial gloss on the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, which is warranted by neither the Act nor its legislative history. *See I.T.O. Corp. v. Benefits Review Board*, 529 F.2d 1080, 1089 (4th Cir. 1975) (Craven, J., dissenting). I add only these brief observations. A careful study of the majority opinion filed when this case was heard by a panel, *I.T.O. Corp.*, 529

F.2d at 1081, discloses that the effect of the point of rest theory is to deprive longshoremen of coverage under the Act when they are injured while stuffing or stripping a ship's containers at a marine terminal. The slight modification of the theory in the majority's per curiam opinion alleviates some, but not all, of its harsh results. It does so, however, at the expense of adding the factor of lapse of time to the vague concept of place for determining the point of rest. Rational, uniform application of the court's theory to the myriad circumstances in which injuries occur will be most difficult.

Judge Craven initially voted with the majority to deny the Director standing as a party to these proceedings. On en banc reconsideration, he is now persuaded otherwise, and concurs in Judge Butzner's opinion.

OPINION AND JUDGMENT OF A PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 75-1051

I.T.O. Corporation of Baltimore, Employer, and
Liberty Mutual Insurance Company, Carrier,
Petitioners,

v.

Benefits Review Board, U.S. Department of Labor,
Respondent,
William T. Adkins,
Respondent,
International Longshoreman's Association,
Amicus Curiae.

No. 75-1075

Maritime Terminals, Inc., and
Aetna Casualty and Surety Co.,
Petitioners,

v.

Secretary of Labor, and Donald D. Brown,
Respondents.

 No. 75-1196

Maritime Terminals, Inc., and
Aetna Casualty and Surety Co.,
Petitioners,

v.

Vernie Lee Harris, and
United States Department of Labor,
Respondents.

 No. 75-1088

National Association of Stevedores, et al.,
Petitioners,

v.

Benefits Review Board, U.S. Dept. of Labor,
Respondent,
William T. Adkins,
Respondent.

On Petition for Review of the Order of the Benefits Review
Board.

Argued August 21, 1975. Decided December 22, 1975.

Before Haynsworth, Chief Judge, Winter and Craven, Cir-
cuit Judges.

* * *

Winter, Circuit Judge:

These appeals present the question of first impression of the extent to which the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, extend benefits under the Act to persons engaged in necessary steps in the overall process of loading and unloading a vessel, but who, prior to the Amendments, could claim benefits for accidental injury or death only under state law. The Administrative Law Judge and the Benefits Review Board of the Department of Labor held that benefits under the Act had been extended to all persons handling cargo or performing related functions in the terminal area. We disagree, and reverse each of the three awards in these cases.

We conclude that the Act's benefits extend only to those persons, including checkers, who unload cargo from the ship to the first point of rest at the terminal or load cargo from the last point of rest at the terminal to the ship. While the 1972 Amendments do extend the benefits of the Act to some persons who were not previously eligible, coverage is limited by the concept of "maritime employment," and not every person handling cargo between ship and point of discharge to the consignee or point of receipt from the shipper is engaged in "maritime employment." On the facts we conclude that these three claimants were not. The 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in "maritime employment" was injured on land.

A subsidiary question in Nos. 75-1051 and 75-1088 is raised by the motion of Benefits Review Board, Department of Labor, to substitute the Director, Office of Workers' Compensation Programs, Department of Labor, as to which is the proper respondent in a petition to review under 33

U.S.C. § 921(c). We think that neither is a proper party to the proceedings. We therefore deny the Board's motion to substitute, and dismiss the Board. We will treat the Director as *amicus curiae*.

I.

The awards presented for review were made to William Adkins, who was injured at Dundalk Marine Terminal in the Port of Baltimore, and to Donald D. Brown and Vernie Lee Harris, both of whom were injured at Maritime Terminals, Inc., the lessee and operator of Norfolk International Terminals in Norfolk, Virginia.

A. Adkins was a forklift operator and he sustained his injuries while he was moving a load of brass tubing from its storage place in a warehouse to a waiting delivery truck which would transport it to its ultimate destination. He performed a function in the overall unloading of the ship and discharge of its cargo from the terminal. The tubing had arrived at the terminal some seven days earlier aboard the SS American Legend, packed in a container. The container had been removed from the vessel and immediately taken from the ship's side to a marshaling area one-half to three-quarters of a mile away where it was stored with other containers. The ship sailed on the same day that it had docked. Three days later the container was moved 1,000-1,200 feet to a warehouse or transit shed, known as Shed 11, where the container was "stripped," i.e., unloaded, and the brass tubing stored to await transportation to its destination. The delivery truck did not arrive until four days later, and shortly thereafter Adkins was injured loading the tubing into it with his forklift.

Shed 11 was 685 feet from the water's edge. It was not

connected geographically or functionally with the ship's berthing area, and ships were neither loaded nor unloaded from it.

B. Brown suffered carbon monoxide poisoning while he was engaged as a forklift operator at Marine Terminals. He performed a function in the overall loading of cargo on board a ship. He operated his forklift in a warehouse where cotton piece goods and barrels of chemicals had been deposited after delivery by truck or rail. His job was to move loads of these items from their storage place to a container which was then "stuffed," i.e., loaded with the items he had moved.

After a container was fully loaded, it was sealed and moved by another vehicle, called a "hustler," to a marshaling area adjacent to the pier. The container would then be lifted from the "hustler" and placed in a stack with other containers to await the arrival of a ship. When the ship arrived the container would be loaded aboard. Brown took no part in these latter operations. They were performed by persons other than employees of Marine Terminals. At no time was Brown required to board a ship. The warehouse in which he worked was 850 feet from the water's edge.

C. Harris was injured when the brakes failed on a "hustler" which he was operating and it collided with a container. He, too, performed a function in the overall loading of a ship; his was the next after that performed by Brown. Harris moved the containers from the long-term container storage area to the container marshaling area adjacent to the pier. He had just deposited a container at the container marshaling area and was on the return trip to the long-term container storage area to pick up another container when his brakes failed. No ship was present at the pier at the time, and the containers in the marshaling

area were not scheduled to be loaded aboard a vessel until later in the day when one was scheduled to arrive.

II.

The awards were made under § 3(a) of the Act, 33 U.S.C. § 903(a) (1975 Supp.), which, in pertinent part and with italics to show the Amendments made in 1972, provides:

Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*)

The meaning of the words "employee" and "employer" is found in § 2(3) and (4), 33 U.S.C. § 902(3) and (4) (1975 Supp.); and these subsections, with italics to show the 1972 Amendments, provide:

(3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, ship-builder, and shipbreaker*, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters

of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

Prior to 1972,¹ benefits were payable under the Act to any person (except a master or member of a crew or a person loading or unloading a vessel under eighteen tons net) if he was injured "upon the navigable waters of the United States (including any dry dock) and if recovery for the disability through workmen's compensation proceedings [could] not validly be provided by State law," with certain exceptions not material here. The pre-1972 Act thus did not distinguish among employees depending on the function they performed. Instead, the geographical location of the injury was all-important, with coverage stopping at the water's edge.

Sections 2 and 3 of the present Act establishes a dual test for coverage. The situs requirement has been retained, with the definition of "navigable waters" expanded to include certain specified land areas. In addition, a new "status" test has been added: the person injured ("employee") must have been engaged in "maritime employment," a concept

¹ The 1972 Amendments to §§ 2 and 3 were only part of a broad overhaul of the Act. Other amendments substantially increased the maximum and minimum benefits which could be awarded; accomplished a legislative overruling of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), which permitted a longshoreman to recover damages from a ship resulting from the ship's unseaworthiness; and effected a legislative overruling of *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), under which a ship could recoup from a longshoreman's employer the damages it was required to pay the longshoreman for injuries he suffered due to the unseaworthiness of the ship, on the theory that the employer breached an expressed or implied warranty of workmanlike performance.

which is nowhere defined but which includes "longshoring operations." The net effect of the 1972 Amendments was therefore to *broaden* the area in which an injury would be covered, and *narrow* the class of persons eligible according to job function.

Section 4 of the amended Act, 33 U.S.C. § 904, limits liability for compensation to an "employer" as defined in § 2(4), 33 U.S.C. § 902(4). The definition is so drafted that it appears that an employer will always be liable for his "employees'" covered injuries. It therefore does not prescribe another, additional test for coverage.

III.

We have no doubt that each of the claimants satisfies the situs test of the post-1972 Act. As a minimum, they were injured at a terminal, adjoining navigable waters, used in the overall process of loading and unloading a vessel. The difficult issue is whether they also satisfy the status test—were they engaged in "maritime employment," or may they be deemed longshoreman or persons engaged in longshoring operations within the meaning of the Act?

The meaning of the terms "maritime employment," "longshoreman" and "persons engaged in longshoring operations" is not so fixed and certain that the Act alone provides the answer. "Maritime employment" is a phrase that embodies the concept of a direct relation to a vessel's navigation and commerce. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 61 (1914) ("The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character.") Ordinarily the question of whether a person was engaged in "maritime employment" is to be determined

as of "the time of the accident." *Parker v. Motor Boat Sales*, 314 U.S. 244, 247 (1941). See *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334, 340 (1953). But while the cases establish that loading and unloading a vessel is maritime employment, they all limited recovery to injuries sustained on the seaward side of the water's edge because such was the limit of admiralty jurisdiction. See discussion and collection of authorities in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 204-07 (1971). Thus, the cases shed no real light on how far shoreward the maritime nature of loading and unloading extends, particularly where, as here, the shore-based aspects of the overall loading and unloading operations have been split into numerous functions and assigned to different employees.

"Longshoreman" and "longshoring operations" are words of no greater exactness of meaning. It is true that in *Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (2 Cir. 1970), it was said that "[h]istorically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers." *Id.* at 886. At the same time, however, the opinion recognized that "[t]he work of stevedores is the loading and unloading of ships." *Id.* at 889. The case dealt with a freight forwarder's complaint that an agreement between a longshoremen's union and a steamship carriers' association, which foreclosed the forwarder's employees from stuffing and stripping containers, constituted a restraint of trade. The decision is hardly determinative of just what functions a longshoreman performs and at what point in the unloading and loading processes, if any, he ceases to perform longshoring operations.

Perhaps more significant is the fact that the Secretary of Labor, in promulgating regulations to foster safe conditions in the longshoring industry, defined "longshoring operations" as to "loading, unloading, moving, or handling of, cargo, ship's stores, gear, etc., *into, in, on, or out of any vessel on the navigable waters of the United States.*" 29 C.F.R. § 1918.3(i) (1974) (emphasis added). See 29 C.F.R. § 1910.16(b)(1) (1974). Of course these regulations were adopted prior to enactment of the 1972 Amendments and it may well be, as the government argues, that they will ultimately be redrafted when the scope of the 1972 Amendments has been judicially determined. They are significant evidence, however, of the meaning attached to the words at the time that Congress was considering the 1972 Amendments.

Because we conclude that the terms "maritime employment," "longshoreman" and "longshoring operations" are not such words of art that we would be justified in deciding the case without resort to the legislative history of the 1972 Amendments and full consideration of the context in which they were enacted, we turn to these secondary sources. See *United States v. Oregon*, 366 U.S. 643, 648 (1961).

IV.

The Act was initially adopted in 1927 as a congressional response to a series of holdings that the states were without power to afford a workmen's compensation remedy to workers aboard vessels, and that Congress lacked the authority to validate the application of state remedies to such workers, *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). The rationale of those cases was that under the Constitution

only Congress had authority over longshoremen injured on the seaward side of the pier. Congress responded to the broad suggestion in *Dawson*, 264 U.S. at 227, that Congress enact "general provisions for compensating injured [maritime] employees . . ." by enacting the 1927 Act.²

Continuing problems in the application of the Act arose from the fact that it limited recovery to injuries occurring on navigable waters, *i.e.*, it looked to the situs of the injury rather than to the maritime status of the injured longshoreman. See *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215-16 (1969). Specifically, *Nacirema* held that the Extension of Admiralty Jurisdiction Act, which extended admiralty jurisdiction to certain land structures, did not operate to modify the basic requirement of the Compensation Act that benefits be afforded solely on account of death or injuries not reachable by state workmen's compensation

² It was not until the decision in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), that the availability of the Act's remedies for all injuries to employees on navigable waters was firmly established. Pre-1927 cases had tried to afford some protection to injured maritime employees by whittling down the *Jensen* doctrine with the so-called "maritime but local" exception, which allowed the application of state law to admittedly maritime accidents in areas of "local concern." See, *e.g.*, *Grand Smith-Porter Ship Co. v. Rhode*, 257 U.S. 469 (1922); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921). After the passage of the 1927 Act, it was unclear whether these decisions persisted as a limit on the federal law's scope. *Calbeck* made it plain that they did not. What did survive was a sphere of concurrent state and federal jurisdiction, the so-called "twilight zone." This was the area where it was impossible to predict, before litigation, whether the employee's activities were so local that a state workmen's compensation act might apply. See, *e.g.*, *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959); *Davis v. Department of Labor and Industries*, 317 U.S. 249 (1942).

For a description of the genesis of the Act and the principal judicial constructions of it, see dissenting opinion of Haynsworth, C.J., in *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900, 910-11 (4 Cir. 1968), *rev'd sub nom. Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

statutes, *i.e.*, those beyond the pier on the seaward side. Such a holding necessarily resulted in anomalies, *e.g.*, benefits were denied three longshoremen in *Nacirema* who were injured or killed when cargo hoisted by the ship's crane swung back and knocked them to the pier or crushed them against the side of a railroad car, while the widow of a fourth longshoreman whose decedent had a similar accident but was knocked into the water and drowned was able to recover. (Her case was not taken to the Supreme Court.) See *Marine Stevedoring Corporation v. Oosting*, 398 F.2d 900 (4 Cir. 1968). See also the dissenting opinion of Chief Judge Haynsworth in *Oosting* commenting on incongruities in application of the Act, 398 F.2d at 911, and our opinion in *Snydor v. Villain & Fassio et Compania Int. DiGenova*, 459 F.2d 365 (4 Cir. 1972), setting forth a number of ship-related but uncompensable injuries. Indeed, the Court in *Nacirema* apparently anticipated incongruous results stemming from its holding because it said:

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. . . . [C]onstruing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the Jensen line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in Jensen separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court. 396 U.S. at 223-24.

See also *Victory Carriers v. Law*, 404 U.S. 202, 216 (1971).

To the extent pertinent here, the 1972 Amendments were a direct response to the invitation in *Nacirema*. Given that Congress has the power to extend admiralty jurisdiction to the landward side of the Jensen line, we think that the most informative source on how far the line was extended is contained in the virtually identical House and Senate Reports, dealing with "Extension of Coverage to Shoreside Areas." See S. Rep. No. 92-1125, 92 Cong., 2d Sess. (1972); H.R. Rep. No. 92-1441, 92 Cong., 2d Sess. (1972). The pertinent portions of the House Report, 3 U.S. Code Cong. and Adm. News, 4698, 4707-08 (92d Cong., 2d Sess. (1972)), are set forth in the margin.³

³ The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

* * *

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way,

The committee's report starts with frank recognition that the Act, prior to amendment, embodied the *Jensen* rule: "coverage of the present Act stops at the water's edge The result is a disparity in benefits . . . for the same type of injury depending on which side of the water's edge and in which State the accident occurs."

The committee also recognized that the disparity was worsening, not only because of unrealistic limits on benefits and exemptions from coverage contained in state workmen's compensation law, but also because modern technology in the industry required "more of a longshoreman's work . . . [to be] performed on land than heretofore." The committee then stated its belief that "the compensation payable to a

marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

longshoreman . . . should not depend upon the fortuitous circumstance of whether the injury occurred on land or over water."

With its premise thus established, the committee made a series of significant statements. It said its intent was to provide benefits to employees "*who would otherwise be covered by this Act for part of their activity*" (emphasis added). As an example, it cited employees who unload cargo from a ship and transport it "immediately . . . to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." Such employees were to be compensated if they were injured over navigable waters or on the adjoining land area. Conversely, employees not engaged in loading or unloading a vessel were *not* to be covered even if they were injured on land in an area used for such activity.

The report specifically stated that "employees whose responsibility is only to pick up stored cargo for further trans-shipment would *not* be covered" (emphasis added), nor would purely clerical employees who do not participate in the loading and unloading of cargo. However, checkers "*directly involved in the loading and unloading functions*" (emphasis added) would be eligible for benefits.

We especially note that the committee report is explicit in delineating the portion of the overall loading and unloading process during which coverage attaches to longshoremen and persons engaged in longshoring operations: the Act applies between the ship and, in the case of unloading, the *first* storage or holding area on the pier, wharf, or terminal adjoining navigable waters. Although the instance of loading a ship was not discussed, we think that the same principle controls in reverse: coverage is afforded from the *last* storage or holding area on the pier, etc., to the ship.

We perceive the landward limit of coverage to be the "point of rest" as that term is generally understood in the industry, Norfolk Marine Terminal Association Tariff, No. 1-C at 18, Item 290, Respondent's Exhibit 1, *Harris v. Marine Terminals, Inc.*, No. 74-LHCA-108 (Aug. 15, 1974), and defined by the Federal Maritime Commission in its regulations governing terminal operators. 46 C.F.R. § 533.6(c) (1974). *See also* *American President Lines, Ltd. v. Federal Maritime Bd.*, 317 F.2d 887, 888 (D.C. Cir. 1962); *DiPaola v. International Terminal Operating Co.*, 311 F.S. 685, 687 (S.D. N.Y. 1970).

Applying these principles to the three cases at bar, we think that in *Adkins*' case the container marshaling area was the first point of rest in the unloading process, and that in *Brown's* and *Harris*' cases the marshaling area adjacent to the pier was the last point of rest in the loading process. Since *Adkins* was injured landward of the first point of rest⁴ and *Brown* and *Harris* were injured landward of the last point of rest, we think it follows that none was afforded coverage under the Act, as amended.

It might be argued that the construction we place on the statute is inconsistent with the congressional committees' statements that the 1972 Amendments were intended to make eligible for benefits "employees who would otherwise be covered by this Act [before amendment] *for part of their activity*" (emphasis added). It may well be that there are no longshoremen engaged in moving cargo between ship

⁴ We are aware that *Adkins* testified that in the past, and sometimes over weekends, he was employed in various capacities "loading and unloading ships" and "on a ship." We think that the record is clear, however, that *Adkins* was not so employed at the time that he was injured; rather his duties were confined to operating a forklift in Shed 11. As we have indicated in the text, the status of his employment is to be determined as of the time of the accident—not by what his previous duties may have been or by what his duties are when he accepts sporadic overtime assignments.

and point of rest who never cross the water's edge. Such workers would not have been covered by the old Act, but will be eligible for benefits under our interpretation of the Amendments.

Our answer is that we have done no more than the committees. Although the committees said that coverage was being limited to employees who would be otherwise covered "for part of their activity," the committees clearly recognized that with modern technology "more of the longshoreman's work is performed on land" and they unequivocally stated that they intended to cover employees who unload the ship and immediately transport the cargo to a storage or holding area (point of rest) on the pier, wharf or terminal, excluding coverage only to those who pick up stored cargo for further transshipment. In view of the latter statements and the liberality of construction to be afforded remedial legislation of this type, we do not feel constrained to give an overly limiting interpretation to the phrase "employees who would otherwise be covered for part of their activity."

In summary, when we examine the amendments in the context of the Act prior to amendment, the case law construing the Act and commenting on the power of Congress to legislate in this area, and the language of the committee reports, we reject the government's assertion that all persons, excluding clerical employees other than checkers, who play any part in the overall loading and unloading process are covered by the Act as amended. We think that, with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers "directly involved in [such] loading or unloading functions."

V.

In the posture in which Nos. 75-1051 and 75-1088 came to our court, the Benefits Review Board, Department of Labor, was named as respondent in a petition under § 21(c) of the Act, 33 U.S.C. § 921(c) (1975 Supp.), to review the Board's order awarding benefits. The claimant, William T. Adkins, was also named as a respondent. In due course the Board moved that it be dismissed from the proceedings and that there be substituted as a respondent the Director, Office of Workers' Compensation Programs. The claimant did not oppose the motion, but petitioners, I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company, and the intervenors, National Association of Stevedores, et al., did oppose it. We deferred decision on the motion until decision of the cases.

In agreement with the holding and reasoning of *McCord v. Benefits Review Bd.*, 514 F.2d 198 (D.C. Cir. 1975), we do not think that the benefits Review Board is a respondent to a petition to review its order under either 33 U.S.C. § 921(c) or Rule 15(a,) F.R.A.P. The same result has been reached by the Ninth Circuit in two unreported cases. *Westfall v. Benefits Review Board* (Nos. 73-2578 and 73-2579, 9 Cir. Dec. 5, 1973); *Walker v. Benefits Review Board* (Nos. 74-1340 and 74-1494, 9 Cir. Aug. 9, 1974). As the District of Columbia Circuit held, "there is sufficient adversity between [employer and employee] to insure proper litigation without participation by the Board," 514 F.2d at 200, and on this reasoning we do not think that the Director, Office of Workers' Compensation Programs is a proper respondent either. We dismiss the Board and deny the substitution. This, of course, is not to say that either the Board or a court of appeals may not, in a proper case, permit intervention by others who have an interest at stake and that they may not

appear as petitioners or respondents as their interests appear.

Counsel for the government have performed a valuable service in these cases by supplementing the argument of the claimants as to the meaning to be afforded the 1972 Amendments. We treat their participation, however, as *amicus curiae*.

In Nos. 75-1075 and 75-1196, no point is made of who are named as respondents. We make none, confident in the belief that in this circuit future litigation will be conducted in accordance with what we have stated.

*Reversed; Benefits Review
Board Dismissed In
Nos. 75-1051 and 75-1088*

Craven, Circuit Judge, dissenting:

William T. Adkins, Donald D. Brown, and Vernie Lee Harris will, I think, be surprised to learn that they are not longshoremen, and astonished to discover that they are not engaged in maritime employment of any kind. If they are not, as my brothers hold, then the Congress has labored prodigiously only to have accomplished nothing at all in its effort to simplify the problems of maritime workers' compensation. While these cases are the first to reach a court of appeals under the 1972 amendments to the Act,¹ they will surely not be the last. Henceforth, injured employees

¹ See generally 1A *Benedict on Admiralty* §§ 15-30 (7th ed. 1973, Supp. October 1975); Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 J. Maritime L. & Commerce 1 (1974); Gorman, *The Longshoremen's Act After the 1972 Amendments*, 20 Practical Lawyer 13 (1974); Comment, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683 (1973); Comment, *The Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits*, 27 U. Miami L. Rev. 94

and their counsel must comb the waterfronts of this circuit, probing hopelessly, like Diogenes with his lantern, for that elusive "point of rest" upon which coverage depends. I decline to make that search, and would hold that these plaintiffs and others like them are covered by the Act as amended.

I.

In general I agree with Part II of the majority opinion. The gist of the amended Act is that for a person to be eligible for compensation he must have been injured on the "navigable waters" of the United States (as redefined by the Act) and that at the time of his injury he must have been an "employee."

I agree with my brothers that Adkins, Brown, and Harris were injured while upon the "navigable waters" of the United States as that term has been expanded by the 1972 amendments.

Since plaintiffs satisfy the "situs" test, the only remaining inquiry is whether or not they had the proper "status," *i.e.*, were they "employees" within the meaning of § 902(3) of the amended Act. If they were, then both requirements for coverage are met, and they are entitled to recover.

II.

To be "employees" within the meaning of the Act, plaintiffs must fall within § 902(3), which provides:

(1972); Note, *Maritime Jurisdiction and Longshoremen's Remedies*, 1973 Wash. U.L.Q. 649 (1973); Note, *Admiralty—the 1972 Amendments to § 903 of the Longshoremen's and Harbor Workers' Act: Has the "Twilight Zone" Moved Onto the Pier?*, 4 Rutgers-Camden L.J. 404 (1973); Note, *Admiralty—Maritime Personal Injury and Death—Longshoremen's and Harbor Workers' Act Amendments of 1972*, 47 Tulane L. Rev. 1151 (1973).

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker,

The critical term is "maritime employment."² That term is used by the Congress generically—a broad term that is said to include the narrower terms: "longshoreman," "longshoring operations," and "harborworker." The latter are lesser included examples of "maritime employment." Thus the terms "maritime employment" and "longshoring" cannot be synonyms. The Act on its face clearly suggests that there are jobs which may not constitute longshoring operations but which are "maritime employment."³

² On the basis that there can be nothing more maritime than the sea, every employment on the sea or other *navigable waters* should be considered as maritime employment. . . . it would be well to adopt a criterion which takes into account the undoubted jurisdiction of admiralty in matters of all injuries on *navigable waters*.

1A *Benedict on Admiralty*, *supra*, note 1 at § 17 (emphasis added). In this context, note the greatly expanded definition of "navigable waters" contained in the 1972 amendments as set forth on page 8 of the majority opinion.

³ There is, apparently, some confusion about this. Appellants consistently take the position that an employee can be covered only if he engages in traditional *longshoring* operations. (" . . . Congress in extending the coverage of the Act shoreward was concerned only with those workers commonly known as longshoremen Clearly Congress did not intend that the Act as amended would apply to workers who during the course of their duties are not required to go on board ship" Brief for Petitioners Maritime Terminals, Inc. and Aetna Casualty and Surety Co. at 19). See, *e.g.*, Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, XLI Ins. Counsel J. 63, 67 (1974) ("The employee must be engaged in 'longshoring operations'"). While for purposes of this appeal I do not find it necessary to go beyond

Because of their professed inability to discern the meaning of "maritime employment" and "longshoring operations," the majority feels driven to legislative history.⁴ With all deference, I think they give up too easily. The Congress is entitled to have its words accorded meaning if it is at all possible to do so, and I think it is. There are guidelines and aids for statutory construction and interpretation which, it seems to me, the majority overlooks in its rush to the committee reports.

A. In the first place, the 1972 amendments to the Act are of a remedial nature, designed to correct inequities

the question of whether these three plaintiffs were engaged as longshoremen, I do point out that to equate maritime employment with longshoring operations denies meaning to the broader term chosen by the Congress.

Indeed, it seems correct to hold that even the term "harborworker" is broader and more generic than "longshoremen," and that longshoremen are but a category of harborworkers.

First in the catalogue of harbor workers is the longshoreman. The longshoreman, as the name implies, is a shoreside worker whose principle activity is the loading and unloading of ship's cargo.

Outside of cargo work in the holds, longshoremen are engaged in various tasks in connection with voyage preparation or termination. The work may consist of carrying ship's stores or passenger's baggage aboard ship. *Or the work may be performed entirely on the pier in the handling of mechanical equipment, or the storing, moving, or loading of goods on the dock.*

M. Norris, 1 *The Law of Maritime Injuries* § 3 (3d ed. 1975). (Emphasis added.)

⁴ Because we conclude that the terms "maritime employment," "longshoreman" and "longshoring operations" are not such words of art that we would be justified in deciding the case without resort to the legislative history of the 1972 Amendments and full consideration of the context in which they were enacted, we turn to these secondary sources.

Maj. Op. 14.

worked by the Act prior to its amendments. With this in mind, we should be guided by a uniform line of cases holding that the Longshoremen's and Harborworkers' Compensation Act should be liberally construed in light of its remedial nature and humanitarian purposes. *See, e.g., Reed v. Steamship Yaka*, 373 U.S. 410 (1963), *rehearing denied*, 375 U.S. 872 (1963); *Voris v. Eikel*, 346 U.S. 328 (1953); *Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1951); *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969); *Calbeck v. A. D. Suderman Stevedoring Co.*, 290 F.2d 308 (5th Cir. 1961); *Old Dominion Stevedoring Corp. v. O'Hearne*, 218 F.2d 651 (4th Cir. 1955); *Blackwell Construction Co. v. Garrell*, 352 F.Supp. 192 (D.D.C. 1972); *Page Communications Engineers, Inc. v. Arrien*, 315 F.Supp. 569 (E.D. Pa. 1970); *Holland American Insurance Co. v. Rogers*, 313 F.Supp. 314 (N.D. Cal. 1970); *Gibson v. Hughes*, 192 F.Supp. 571 (S.D.N.Y. 1961). In addition, case law precedent admonishes us to construe doubts, including factual disputes such as are before us in these cases, in favor of the employee or his family. *Friend v. Britton*, 220 F.2d 820 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 836 (1955); *Hartford Accident & Indemnity Co. v. Cardillo*, 112 F.2d 11 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 649 (1940); *Grain Handling Co. v. McManigal*, 23 F.Supp. 748 (W.D.N.Y. 1938), *aff'd* 102 F.2d 464, *cert. denied*, 308 U.S. 570 (1939). Finally, "a narrowly technical and impractical construction" of this chapter is not favored. *Luckenbach S.S. Co. v. Norton*, 106 F.2d 137, 138 (3d Cir. 1939). Inasmuch as the 1972 amendments were enacted to further the purposes of the original Act, these decisions are still authoritative indications of the proper approach to interpretation of the statute.

B. My brothers failed to give sufficient weight, if any, to a

presumption created by § 20 of the LHWCA, 33 U.S.C. § 920:

§ 920. *Presumptions*

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

- (a) That the claim comes within the provisions of this chapter.

Clearly, the statute switches the ordinary burden of proof. I am unable to agree that defendants have sustained *their* burden by showing by substantial evidence that plaintiffs were *not* engaged in “maritime employment.” At most, defendants have offered some evidence as to the nature of plaintiffs’ employment. That it may be enough to create a doubt will not defeat the presumption. Doubts are to be resolved in favor of the employee. *Friend v. Britton, Bordilla, Grain Handling, supra*; *Beasley v. O’Hearne*, 250 F.Supp. 49 (S.D.W.Va. 1966).

C. Aside from canons of construction and the special statutory presumption, there is another honored approach enabling a court to accord specific meaning to the words of a statute: “A consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts.” *NLRB v. Boeing*, 412 U.S. 67, 75 (1973). This familiar rubric of statutory construction has often found expression in the decisions of this court. *E.g., Brennan v. Prince William Hospital*, 503 F.2d 282 (4th Cir. 1974) (Secretary of Labor’s interpretation of statute entitled to “great deference”); *Tenneco, Inc. v. Public Service Commission*, 489 F.2d 334 (4th Cir. 1973) (“This administrative interpretation, while not controlling,

is entitled to great weight”); *Nacirema Operating Co. v. Oosting*, 456 F.2d 956 (4th Cir. 1972) (“we cannot lightly put aside the Agency’s consistent interpretation of the [LHWCA]”).

Section 939 of the Act entrusts the overall administration of the statute to the Secretary of Labor, and gives him the authority to “make such rules and regulations . . . as may be necessary . . .” Amended § 921 provides for a new method of review of compensation orders whereby disputes as to coverage are first determined by an administrative law judge with right of appeal to the Benefits Review Board. The three Board members are appointed by the Secretary, and their decisions are reviewable by the court of appeals for the circuit where the injury occurred. 33 U.S.C. §§ 921 (b) & (c).

I have examined some 32 decisions of the Board rendered from its inception through October 1975 involving the shoreward extension of coverage under the 1972 amendments.⁶

⁶ *Dellaventura v. Pittston Stevedoring Corp.*, 2 BRBS 340 (Oct. 9, 1975); *Lopez v. Atlantic Container Lines, Ltd.*, 2 BRBS 265 (Sept. 9, 1975); *Shoemaker v. Schiavone & Sons, Inc.*, 2 BRBS 257 (Sept. 5, 1975); *Batista v. Atlantic Container Lines, Ltd.*, 2 BRBS 193 (Aug. 22, 1975); *Spataro v. Pittston Stevedoring Corp.*, 2 BRBS 122 (Aug. 8, 1975); *Stockman v. John T. Clark & Son of Boston*, 2 BRBS 99 (July 30, 1975), *appeal docketed*, No. 75-1360 (1st Cir., filed Sept. 24, 1975); *Johns v. Sea-Land Service, Inc.*, 2 BRBS 65 (July 11, 1975), *appeal docketed*, No. 75-2039 (3d Cir., filed Sept. 9, 1975); *Mildenberger v. Cargill, Inc.*, 2 BRBS 51 (July 3, 1975); *Watson v. John T. Clark & Son of Boston, Inc.*, 2 BRBS 47 (July 2, 1975); *Richardson v. Great Lakes Storage and Contracting Co.*, 2 BRBS 31 (June 26, 1975), *appeal docketed*, No. 75-1786 (7th Cir., filed Aug. 25, 1975); *Skipper v. Jacksonville Shipyards, Inc.*, 1 BRBS 533 (June 11, 1975), *appeal docketed*, No. 75-2833 (5th Cir., filed July 11, 1975); *Cappelluti v. Sea-Land Service, Inc.*, 1 BRBS 527 (June 10, 1975), *appeal docketed*, No. 75-1801 (3d Cir., filed July 23, 1975); *Vinciguerra v. Transocean Gateway Corp.*, 1 BRBS 523 (June 5, 1975); *Powell v. Cargill, Inc.*, 1 BRBS 503 (May 30, 1975), *appeal docketed*, No. 75-2655 (9th Cir., filed July 28, 1975); *O’Leary v. Southeast Stevedore Co.*, 1 BRBS 498 (May 30, 1975); *Nulty v.*

I think these decisions of the Board have established a consistent and reasonable interpretation of the Act which should be accorded "great weight" in this court. The Board is a quasi-judicial body within the agency charged with administration of the Act, and its function is to resolve disputes concerning coverage under the 1972 amendments. Not simply in these three cases, but time and again in an unbroken line of decisions, the Board has found that coverage exists in factually similar cases.

Repeatedly and consistently the Board has emphasized:

1. Outright rejection of the "point of rest" theory as a determinative factor in cases where coverage is disputed.

Halter Marine Fabricators, Inc., 1 BRBS 437 (May 2, 1975), *appeal docketed*, No. 75-2317 (5th Cir., filed May 20, 1975); Scalmato v. Northeast Marine Terminals, Co., 1 BRBS 461 (May 7, 1975); Mininni v. Pittston Stevedoring Corp., 1 BRBS 428 (May 1, 1975); DiSomma v. John W. McGrath Corp., 1 BRBS 433 (April 30, 1975); Ford v. P. C. Pfeiffer Co., Inc., 1 BRBS 367 (March 21, 1975), *appeal docketed*, No. 75-2289 (5th Cir., briefs filed Oct. 2, 1975); Mason v. Old Dominion Stevedoring Corp., 1 BRBS 357 (March 21, 1975); Ronan v. Maret School, Inc., 1 BRBS 348 (March 10, 1975), *appeal docketed*, No. 75-1445 (D.C. Cir., filed May 5, 1975); Kelley v. Handcor, Inc., 1 BRBS 319 (Feb. 28, 1975), *appeal docketed*, No. 75-1943 (9th Cir., filed April 28, 1975); Harris v. Maritime Terminals, Inc., 1 BRBS 301 (Feb. 3, 1975), *appeal docketed*, No. 75-1196 (4th Cir., oral argument Aug. 21, 1975); Perdue v. Jacksonville Shipyards, Inc., 1 BRBS 297 (Jan. 31, 1975), *appeal docketed*, No. 75-1659 (5th Cir., briefs filed June 4, 1975); Herron v. Brady-Hamilton Stevedoring Co., 1 BRBS 273 (Jan. 23, 1974), *appeal docketed*, No. 75-1538 (9th Cir., filed March 7, 1975); Ryan v. McKie Co., 1 BRBS 221 (Dec. 10, 1974); Brown v. Maritime Terminals, Inc., 1 BRBS 212 (Dec. 6, 1974), *appeal docketed*, No. 75-1075 (4th Cir., oral argument Aug. 21, 1975); Coppolino v. International Terminal Operating Co., Inc., 1 BRBS 205 (Dec. 2, 1974); Adkins v. I.T.O. Corporation of Baltimore, 1 BRBS 199 (Nov. 29, 1974), *appeal docketed*, No. 75-1051 and No. 75-1088 (4th Cir., oral argument Aug. 21, 1975); Gilmore v. Weyerhaeuser Co., 1 BRBS 180 (Nov. 12, 1974), *appeal docketed*, No. 74-3384 (9th Cir., oral argument Oct. 17, 1975); Avvento v. Hellenic Lines, Ltd., 1 BRBS 174 (Nov. 12, 1974).

2. Waterborne cargo remains in maritime commerce until such time as it is delivered to a trucker or other carrier to be taken from the terminal for further transshipment.
3. Cargo first enters maritime commerce when it is unloaded from a truck or other carrier and is handled by terminal employees working upon the "navigable waters" of the United States as defined in the Act.
4. The "loading and unloading" of ships is a continuous process involving many different employees working at various places within the terminal area and performing different tasks, but includes the handling of cargo during all times it is in maritime commerce.
5. It is sufficient to bring an employee within the scope of maritime employment that his duties at the time of injury involve handling cargo that is in maritime commerce.
6. The Act does not require that one actually be engaged in loading or unloading vessels to be an "employee" within the meaning of the Act.

I think we should hesitate to reject out of hand the expertise of the Board, and should instead accord its consistent interpretations of the statute "great deference."⁶

⁶ It has become clear that the position taken by the Board with respect to the scope of coverage under the amended Act reflects at least the initial position of the Secretary of Labor.

At 20 C.F.R. Part 710, the Department of Labor issued proposed guidelines for coverage under the LHWCA as amended. Section 710.4(b) states:

Based on procedures normally utilized in the maritime industry, the loading process may include certain terminal activities which are incidental to the placement of cargo on the vessel. Conversely, the unloading process may also include certain terminal activities.

D. Before the 1972 amendments, § 921(b) of the LHWCA provided that review of compensation orders be had in the federal district courts. Although the scope of review was not defined by statute, the cases soon made clear that the district courts' inquiry was "strictly limited." *Mid-Gulf Stevedores, Inc. v. Neuman*, 333 F.Supp. 430, 431 (E.D.La. 1971), *reversed on other grounds*, 462 F.2d 185 (1972). See also *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965). Rulings by the district court could, of course, be appealed to the circuit court of appeals, but the scope of review there was also very narrow. *O'Loughlin v. Parker*, 163 F.2d 1011 (4th Cir. 1947) ("... it is ... undisputed that the compensation order below must be accepted by us if it has warrant in the record and a reasonable basis in law.").

The Benefits Review Board now performs essentially the same function as did the district courts prior to the Act's amendment. One significant difference, however, is that the scope of the Board's review is expressly defined by statute: "The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). Section 921(c) provides that appeals from

Terminal activities to be included in coverage under the amended Act are employees engaged in loading or unloading break-bulk, containerized or Lash ships and lighters, or passenger ships. Activities which may be covered include employees engaged in *stuffing and stripping of containers*, employees working in and about marine railways, and *other employees engaged in processing water-borne cargo*.

(Emphasis added.)

These proposed guidelines are now under study by the Department, and thus do not as yet represent the official view of the Department of Labor. Yet they are useful in ascertaining the Department's initial interpretation of the statute in light of the consistent position taken by the Benefits Review Board.

the Board may be taken to the court of appeals for the circuit where the injury occurred. Significantly, the scope of review in the circuit courts is not defined, limited, or expanded by the 1972 amendments. I should think, therefore, that the same *narrow* review exercised by this court prior to 1972 remains the proper standard of review on appeal today. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Wolff v. Britton*, 328 F.2d 181 (D.C. Cir. 1964); *O'Loughlin v. Parker*, *supra*; *Groom v. Cardillo*, 119 F.2d 697 (D.C. Cir. 1941).

My point is that the majority has failed to heed the restricted scope of review which the cases require of us. In all three cases here on appeal, the administrative law judge found coverage under the Act. In each case the Benefits Review Board, bound by its "substantial evidence" standard, affirmed. The majority opinion reverses, and this, I submit, is error. The record as a whole leaves no doubt in my mind that the decisions of the administrative law judge and the Benefits Review Board have "warrant in the record and a reasonable basis in law." *O'Loughlin v. Parker*, *supra*. I would, on this basis alone, vote to affirm.

III.

The basic disagreement between myself and my brothers is whether or not resort to the legislative history was necessary at all in these cases. My brothers feel that the language of the 1972 amendments is ambiguous, and they accordingly embark upon their search for congressional purpose and intent citing as authority *United States v. Oregon*, 366 U.S. 643, 648 (1961). I find no such ambiguity and note that the operative sentence in the *Oregon* case cited by my brethren reads as follows: "Having concluded that the pro-

visions of [the statute] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act." 366 U.S. at 648. In taking such a position, I find reassurance in case law precedent in this circuit. *United States v. Deluxe Cleaners & Laundry, Inc.*, 511 F.2d 926 (4th Cir. 1975) (not permissible for court to assume that Congress by inadvertence failed to state something other than what is plainly set forth in statute); *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974) ("Congress is presumed to have used words according to their ordinary meaning, unless a different signification is clearly indicated."); *United States v. Erdos*, 474 F.2d 157 (4th Cir. 1973) ("When the power of Congress is clear, and the language of exercise is broad, we perceive no duty to construe a statute narrowly."); *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972) ("Legislative intent is first to be gathered from the plain meaning of the words of the statute."); *Vroon v. Templin*, 278 F.2d 345 (4th Cir. 1960) ("The language of the statute is plain and is to be taken as written."); *Aiken Mills, Inc. v. United States*, 144 F.2d 23 (4th Cir. 1944) ("... when the language of the statute is clear and needs no interpretation we may not look to the legislative history . . ."). *Missel v. Overnight Motor Transp. Co.*, 126 F.2d 98 (4th Cir. 1942) ("Normally the best evidence of congressional purpose is the language of the law itself."); *Inland Waterways Corp. v. Atlantic Coastline R. Co.*, 112 F.2d 753 (4th Cir. 1940) ("Other parts of the same Act, or the debates in Congress, during the passage of the statute, can throw no light on that which is already made plain by the words used in the statute itself.").

It is the term "maritime employment" which troubles the majority. For reasons discussed *infra*, I do not find the term ambiguous, but would instead hold that it has an estab-

lished meaning sufficiently broad and inclusive to cover these three plaintiffs.

* * *

In summary, I would first hold that resort to the legislative history is unnecessary and would affirm on the basis of the plain language of the statute. Secondly, even if it is assumed *arguendo* that the statute is ambiguous, there are: (A) an established rule of statutory construction, (B) a statutory presumption, (C) administrative interpretations of the Act, and (D) a narrow and restricted scope of review in this court, all of which should control our disposition of this case and which, in my view, require affirmance. The majority fails to consider these factors, and in doing so commits error.

IV.

In all candor, I must confess that my objections to the majority's resort to legislative history might have been somewhat mollified had the prize been worth the hunt. Despite close examination of the background of the LHWCA and the 1972 amendments in Part IV of the majority opinion, however, my brothers are unable to produce any statement of congressional intent which conclusively resolves the matters here in issue. Indeed, contrasted to the straight-forward language of amended § 902(3), the phrasing of the House Report relied upon by the majority is to me virtually useless as a guide to who is covered and who is not.⁷

The sentence in the House Report thought crucial by the majority reads as follows: "Thus, employees whose

⁷ See footnote 3 of the majority opinion, *supra*.

responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." I think they read more into the sentence than is there. In the first place, over-the-road and local truck drivers who come to a terminal to pick up cargo for further transshipment would certainly not be covered for several reasons: (a) ordinarily they are at the outer perimeter of the terminal and not on "navigable water,"⁸ (b) usually truck drivers, certainly if unionized, never load their trucks; they only *drive* them. The sentence from the House Report is inartful, and seems to mean that neither clerical workers nor truck drivers picking up shipments are covered and for the same reason: neither category of workers have anything to do with the loading or unloading of cargo. The wording in the House Report just quoted cannot be so broadly construed so as to exclude from coverage those workers who (1) work on the "navigable waters" and (2) must directly handle cargo in the *overall* process of loading and unloading ships.

I think it is clear that the legislative history standing alone cannot support the majority position. At best, the House Report matches its own ambiguity against that of the statute. The majority opinion makes sense only when the legislative history is paired with the "point of rest" theory, a concept which appears *nowhere* in the legislative history *or* the statute, and one which I predict, will confound and perplex this court for years to come.

According to the majority, waterborne cargo leaves the chain of maritime commerce when it is taken off the ship and lowered to its "point of rest." Likewise, cargo enters

⁸ Section 903(a), reproduced at page 8 of the majority opinion, *supra*.

maritime commerce when it is picked up from its "point of rest" and loaded onto the ship. Waterfront employees who handle cargo on the landward side of this point would thus not be covered by the Act, for their service would not be "maritime employment." On the other hand, as this same cargo passes through the "point of rest" seaward, it somehow undergoes a qualitative metamorphosis, acquiring maritime characteristics; employees who handle the cargo on that side of the point are engaged in "maritime employment" and are covered by the Act. Thus, the location of the "point of rest" is crucial.

The majority relies upon two pre-amendment definitions urged upon the court by appellants in their briefs. The Norfolk Marine Terminal Association Tariff (Item 290) defines the term thus:

The term "point of rest" means a point within a Terminal where the terminal operator designates that cargo or equipment be placed for movement to or from a vessel.

Federal Maritime Commission Regulations, 46 C.F.R. § 533.6(c), refer to the point as follows:

"[P]oint of rest" shall be defined as that area on the Terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned from the receipt of outbound cargo from shippers for vessel loading.

In addition, the FMC has noted:

The handling of cargo by a Terminal operator is (t)he service of physically moving cargo between the point of

rest and any place on the Terminal facility other than the end of the ship's tackle. 46 C.F.R. Section 533.6 (d)(6).

Where in the Act or its legislative history is there any suggestion that the Congress meant for us to "read into" the statute the proposition that "maritime employment" exists only on the seaward side of this "point of rest" as defined in these pre-amendment regulations? If Congress, as appellants claim, meant to embrace the concept of the "point of rest" as a demarcation line between "maritime" and "non-maritime" employment, why was this "generally understood" doctrine not explicitly written into § 902(3) of the Act, defining "employee," or at the very least, mentioned in the legislative reports? Surely a concept of such alleged widespread use and application is too conspicuous by its absence to be read into the statute. This court has no license to find in a statute words which the Congress did not put there.

"Statutory explication may be an art, but it must not be artful." *United States v. Parker*, 376 F.2d 402 (5th Cir. 1967). "[O]ne sentence in a Senate Report is not controlling where both houses of Congress have passed a bill containing unambiguous language to the contrary." *Abell v. Spencer*, 225 F.2d 568 (D.C. Cir. 1955). "[W]e know of no authority for the substitution of the language of a Committee Report for that of the statute to which it relates." *Wodehouse v. Commissioner*, 166 F.2d 986 (4th Cir. 1948).

A survey of legal commentary on the 1972 amendments⁹ reveals only one instance where the point of rest theory was

⁹ See authorities cited in footnote 1, *supra*.

discussed,¹⁰ although shoreside extension of coverage was an issue considered by every writer.

That the "point of rest" theory attracts so little support from legal scholars suggests to me their awareness that its application would destroy congressional purpose and emasculate the administration of the Act. Counsel for appellants have conceded, both in their briefs and in oral argument, that the location of the "point of rest" will vary from port to port, depending upon the sophistication of each port's cargo-handling facilities. The definitions relied upon by the majority, moreover, would grant to the terminal operator power to shift unilaterally the "point of rest" seaward or shoreward at his whim or caprice.

If the "point of rest" theory remains wedged between the lines of the LHWCA, the result can only be to erect yet another "situs" requirement for coverage. Once the initial "situs" test is satisfied, *i.e.*, it is determined that a worker is injured on "navigable waters" as defined by the Act, the only remaining inquiry should be whether his employment is "maritime." A worker's "status," *i.e.*, whether he is engaged in maritime employment, should be determined by the *nature* of his work, and not *where* he performs it. Yet, the "point of rest" theory, adopted by the majority, means that workers performing the *same* function, handling the *same* cargo, will be treated differently depending upon *where* they work, even though they are all working on the premises of a terminal conceded to be within the Act's definition of "navigable waters." It was precisely this anom-

¹⁰ *Vickery, supra* note 4 at 68. In the introductory paragraph to Mr. Vickery's article it is stated that he worked "extensively" with the Congress as a representative of several maritime and steamship associations in drafting the 1972 amendments. Yet I note again that the "point of rest" theory which, he insists, is a part of the statute is nowhere to be found in the Act nor is it mentioned in the legislative history.

ally, where workers exposed to identical risks receive disparate workmen's compensation benefits, which provided the impetus for the 1972 amendments.¹¹ Thus, the majority effectively holds that the Congress has failed in its effort to correct a bad situation, and that coverage even yet depends upon a fictional location—point of rest—that has no relation whatever to the inherent risks of employment.

All three plaintiffs in these appeals were required to handle ship's cargo while on the navigable waters of the United States. The risks incident to such hazardous employment resulted in unfortunate injury to all three. I believe the LHWCA covers each one, and that Congress intended just such a result.

V.

I am convinced that Adkins, Brown and Harris are "employees" covered by the Act, whether the nature of their employment is termed "maritime," "longshoring," "harbor-worker," or "loading and unloading." It is clear, however, that "maritime employment" is the broadest of the terms, while "loading and unloading" is the narrowest and the most indisputably "maritime." Accordingly, while I prefer not to quibble over labels, I feel it important to demonstrate that there is ample case law precedent for the proposition that all three plaintiffs were engaged in "loading and unloading"¹² ships, an occupation which is inherent in the

¹¹ *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); Note 1973 Wash. U.L.Q., *supra* note 1 at 666.

¹² See, e.g., Gorman, 20 Practical Lawyer, *supra* note 1 at 18. ("... the test for coverage is whether the employee is 'directly involved' in loading, unloading, repairing or building a vessel. There is bound to be litigation that will outline in a case-by-case basis the tests to determine coverage of employees injured in adjoining areas."); Note, 1973 Wash. U.L.Q., *supra* note 1 at 670; Note 4, Rutgers-Camden L.J., *supra* note 1 at 410-412.

work of longshoremen, who, in turn, are defined by the Act to be in "maritime employment" and thus are covered "employees."

Most of the cases¹³ describing the "loading and unloading" of ships involve attempts by longshoremen to assert a cause of action in admiralty against a shipowner for injuries sustained in ship's service.

In *Litwinowicz v. Weyerhaeuser S.S. Co.*, 179 F.Supp. 812 (W.D. Pa. 1959), a plaintiff was injured as steel beams were being loaded into a vessel. Plaintiff's job was to prepare the beams for unloading from a railroad car on the pier so that they could be then loaded into the ship. This work was performed on land and *inside* the railroad car. In holding for the plaintiff, the court remarked:

The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiff's actions at the time of the accident were direct, necessary steps in the transfer of the steel from the railroad car into the vessel which constituted the work of loading.

179 F.Supp. at 817-18. The court expressly rejected the defense contention that plaintiff was merely preparing the cargo for loading, and was therefore not actually engaged in loading the ship.

In *Hagans v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3d Cir. 1963), bags of sand were unloaded from a ship in canvas slings. The bags were placed upon a four-wheeled flatbed truck; then a tow motor vehicle was hooked to the

¹³ Although the Act has been amended, prior cases defining the scope of "maritime employment" and "loading and unloading" are still useful in determining who is covered under the 1972 amendments and who is not. 1A Benedict, *supra* note 1 at § 18.

truck and pulled it into a large warehouse building some distance from the ship's berth. After the truck arrived inside the warehouse, plaintiff's job was to lift off bags of sand and stack them five-high on the floor of the warehouse. Plaintiff slipped on loose sand on the warehouse floor and was injured. The defense claimed that plaintiff was merely stacking bags for purposes of transshipment, an argument which has a familiar ring in the context of the cases here on appeal. The court, in rejecting this argument, held:

He was unloading bags of sand from the motor-towed trucks and placing them in the first immobile resting place ashore. They were the same bags handled by his fellow longshoremen who had started the process of discharge of the cargo in the hold of the vessel. The pier apron could not contain the large number of bags which, in any event, had to be protected from the weather, by being placed within the pier building. The conclusion is inescapable that Hagans performed an integral part of the unloading of the vessel and thus as a matter of law he was in ship's service.¹⁴

318 F.2d at 571.

In *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964), the problem again involved loading steel from freight cars into a ship. In order to bring a particular freight car into position for unloading, it was necessary to "bump" it into position using other freight cars pulled by the ship's winch. Plaintiff was stationed at the brake of the car to be

¹⁴ The term "first immobile resting place ashore" suggests an awareness by the court of the point of rest theory. Yet note that this was not the determinative factor considered by the court in reaching its ultimate conclusion. Rather, the court emphasized the *nature* of the plaintiff's job and stressed the fact that plaintiff was required to handle the cargo.

unloaded. The impact of the other cars striking the one upon which plaintiff was standing catapulted him across the track where his left leg was amputated by the wheels of the railroad car. The court had no difficulty finding that plaintiff was engaged in the process of loading a ship, although he was not even handling cargo at the time of his injury.

In *Spann v. Lauritzen*, 344 F.2d 204 (1965), nitrate powder was being unloaded from a ship by crane and dropped into a hopper on the pier. As trucks drove under the hopper, plaintiff would discharge nitrate into the waiting trucks by pulling a heavy bar or handle. A malfunction of the handle caused plaintiff's injuries. The question on appeal was whether plaintiff was *unloading* a ship or merely *loading* a truck for further transshipment. Citing *Hagans*, *Calamar*, and *Litwinowicz*, *supra*, the court held plaintiff was engaged in "unloading" a ship, and was "no less so because modern ingenuity suggested the desirability of combining the unloading of the vessel with the loading of the trucks. . . . The labor saving method here used which facilitated the removal of the cargo by motor vehicles may not be held to eliminate the unloading of the cargo from the area of traditional work of the seamen in the service of the vessel." 344 F.2d at 206.

In *Olvera v. Micholos*, 307 F.Supp. 9 (S.D. Texas 1968), plaintiff was using a power shovel to pick up corn from a railroad car and move it into a warehouse, from which it was then loaded into a ship's hold. The district court refused a defense motion for summary judgment on plaintiff's personal injury claims on the grounds that plaintiff could possibly prove that his work was "an essential part of the loading process." 307 F.Supp. at 11.

In *Byrd v. American Export Isbrandtsen Lines, Inc.*, 300 F.Supp. 1207 (E.D. Pa. 1969), plaintiff was attempting to move cargo from the back of the pier into a position on the

front of the pier for loading onto a ship. Plaintiff was injured while operating a forklift truck for this purpose. In holding that plaintiff was "essentially engaged in a loading operation," 300 F.Supp. at 1208, the court relied upon *Litwinowicz, supra*, and declared that "defendant unduly delimits the term 'loading' to the actual transfer of the cargo from the front of the pier to the vessel." 300 F.Supp. at 1028.

The plaintiff in *Chagois v. Lykes S.S. Co.*, 432 F.2d 388 (5th Cir. 1970), was standing inside a boxcar operating an auger which facilitated the even flow of rice out of the railroad car. Rice flowed from the railroad car into a shore-based hopper and was thence loaded in bulk into the hold of a waiting vessel. Plaintiff was injured operating the auger. In holding that plaintiff was engaged in loading a ship, the court held that "his work . . . was an essential part of an unbroken sequence of moving the rice from the pier to the ship." 432 F.2d at 391.

A very important case is *Law v. Victory Carriers, Inc.*, 432 F.2d 376 (5th Cir. 1970). Plaintiff in this case had various waterfront duties. On the day of his accident he was driving a forklift on the dock. Plaintiff would take the cargo from one point on the pier to another point closer to the ship. He was injured during this process.

The court first considered the minority view of "loading" ships. "One approach . . . is to define 'loading' in an exceedingly narrow and mechanical fashion, limiting it to those activities which begin with the physical act of lifting the cargo onto the vessel." 432 F.2d at 380. The court cited as illustrative of this doctrine *Drumgold v. Plouba*, 260 F.Supp. 983 (E.D. Va. 1966). The court then noted that "the more prevalent view, however, is found in cases which define the terms 'loading' and 'unloading' in a more pragmatic and less ritualistic sense." 432 F.2d at 383.

The court concluded:

We choose to align ourselves with the cases which define "loading" and "unloading" in a realistic sense rather than as hypertechnical terms of art. . . . He was a part of a group of longshoremen who were engaged in the total operation of moving cargo from the dock to the vessel. . . . The efforts of both the ship-side workers and the shore-side workers were necessary to load the ship. . . . Laws' activities had proximity to and continuity with the job at hand—the task of loading cargo aboard the [ship]. His specific job performance was so integrally woven into the entire loading operation that the two cannot be separated except by the erection of hypertechnical and unrealistic legal barriers. If the terms . . . are to be terms associated with reality rather than mere conceptual microcosms without adjuncts beyond the ship's beam, we have no choice but to conclude that the plaintiff Law was engaged in loading the [ship]." 432 F.2d at 384.¹⁵

¹⁵ The Supreme Court reversed this opinion of the Fifth Circuit in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, but on grounds which had nothing to do with the Fifth Circuit's approach to "loading and unloading." The Supreme Court reversed as to *liability*, holding that state workmen's compensation laws applied since the LHWCA could only apply within the reach of federal admiralty jurisdiction, i.e., on the "navigable waters" of the United States. This opinion inspired in part the effort to amend the LHWCA so as to include certain shore-based facilities within the definition of "navigable waters."

The Supreme Court did *not* reverse the Fifth Circuit on the ground that it had incorrectly determined that Law was engaged in loading the ship. Indeed, this is made explicitly clear in footnote 14 of the opinion, 404 U.S. at 214. There the Supreme Court held that limiting coverage under the LHWCA to work performed on "navigable waters" would make it unnecessary for the Court to become involved in the proper one, and would suggest that this circuit has in fact adopted this view in the *Gutzeit* case, discussed *in/ra*.

Since the reversal was not grounded in the Fifth Circuit's definition of loading and unloading, I think that such an approach is still a dispute over what is and is not "loading and unloading." *Id.*

In *McNeal v. Havtor*, 326 F.Supp. 226 (E.D. Pa. 1971), plaintiff's job was to operate a "squeeze lift" truck within the confines of a warehouse or pier shed. His job was to lift and transfer cases from pallets owned by one company to pallets owned by the defendant. The plaintiff never went aboard a vessel, and his function was simply to move cargo from one pallet to another inside the pier shed. Plaintiff was injured due to some defect in the truck. The court stated:

Defendant asks that we characterize libelant's job as a mere transfer of materials from the place on the pier warehouse to another place within the warehouse. . . . We cannot subscribe to . . . the narrow characterization urged by defendant. The more prevalent view which is well supported by authoritative case law is to define the term "loading" in a realistic, pragmatic and non-ritualistic manner.

326 F.Supp. at 222.

The court states the rule thus:

Where the conduct in question is a direct and necessary step in the loading operation and where the equipment being used is necessary for that purpose, libelant must realistically be considered as engaged in the loading process of the vessel for the purposes of unseaworthiness.

326 F.Supp. at 229.

The court also noted that:

[B]ecause the work was done by three separate longshoring gangs in three integrated steps does not make the entire operation any less a loading operation. . . . In a realistic sense, the loading process must begin

somewhere. We hold, on the present record, that it at least begins when the intended cargo in the pier shed begins its movement towards the ship. We consider it a strained analysis that the process of loading may only be characterized as the actual physical lifting of the cargo into the ship's hold.

326 F.Supp. at 229.

Garrett v. Gutzeit, 491 F.2d 228 (4th Cir. 1974), is a Fourth Circuit case decided in 1974. The factual situation involved unloading bales of paper from a ship. The cargo was removed from the ship and set down on the pier where other members of the longshoring gang then moved the bales one at a time on hand trucks into a pier shed. As they arrived in the shed, plaintiff's job was to take the cargo off the hand trucks and stack the bales four-high. The court noted that "the cargo was transferred from the pier apron and stacked in the shed to facilitate the removal of more bales from the hold." 491 F.2d at 230. When one of the metal bands encasing the cargo snapped, the plaintiff was injured.

The court held:

The [district] court apparently concluded that "unloading" ceases when the cargo is no longer in contact with the ship, i.e., when the bales were deposited on the pier and discharged from the ship's gear. Although we find this theory appealing because of its ease of application, we believe that the case law rejects such a narrow definition of "unloading."

491 F.2d at 228.

The case is also important because it apparently rejects the narrow definition of "loading and unloading" set forth in *Drumgold*, *supra*, 260 F.Supp. 983. The court first noted

the district court's reference to its prior decision in the *Drumgold* case, and held:

We, however, are guided by the historical development of the warranty rather than by arbitrary definitions of admittedly amorphous terms. . . . The record in the instant case demonstrates that it was necessary to move the bales away from the side of the ship as they were discharged from the ship's gear so the additional bales could be unloaded. It was, therefore, a necessary step in the unloading operation.

491 F.2d at 236.

The *Gutzeit* case is important to this appeal because it aligns this circuit with the view that "loading and unloading" are not "words of art" and ought rather to be given a "realistic" meaning.

The only realistic conclusion in this appeal is that Brown, Harris, and Adkins were all engaged in the overall process of loading and unloading ships. Donald Brown was a forklift operator employed to pick up cargo inside a warehouse and load it into large containers which, when sealed, would be placed aboard a ship. Vernie Lee Harris was a hustler driver who moved containers "stuffed" with cargo from a long term storage lot to a marshaling area adjacent to the pier. Adkins operated a forklift truck inside a pier shed, and would pick up cargo recently "stripped" from containers and load these pallets into trucks for shipment to the ultimate consignee. All three worked on terminal premises, i.e., on "navigable waters." All three were required to subject themselves to the risks inherent in moving and handling cargo and in operating the potentially dangerous machinery of the trade. All three were injured as the direct result of the hazards of such employment. In my opinion, these three

plaintiffs were injured in the process of loading or unloading a ship while upon navigable waters. The plain language of the statute requires no more (and indeed, less) than this, and neither should this court. But if I am wrong, and these plaintiffs were not engaged in longshoring work, surely they must be found to have been engaged in maritime employment—the generic term—or else it seems to me the Congress has legislated in vain.

I dissent.

App. 63

**Decision of the Benefits Review Board,
BRB No. 74-123.**

**U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D.C. 20210**

WILLIAM T. ADKINS

Claimant-Respondent

v.

I.T.O. CORPORATION OF BALTIMORE

Employer

and

**LIBERTY MUTUAL INSURANCE COMPANY
Carrier**

Petitioners

Issued: Nov. 29, 1974

**Appeal from Decision and Order of Herman T. Benn,
Administrative Law Judge, United States Department
of Labor.**

**Before: Washington, Chairperson, Hartman and
Miller, Members.**

Hartman, Member:

**This is an appeal by the employer and carrier from the
decision and order (74-LHCA-12) of Administrative Law
Judge Herman T. Benn awarding temporary total and per-
manent partial disability benefits and a fee to the claim-
ant's attorney under the provisions of the Longshoremen's
and Harbor Workers' Compensation Act, 44 Stat. 1424, as
amended, 33 U.S.C. § 901 *et seq.***

Decision: BRB No. 74-123.

The administrative law judge found that the claimant, a forklift operator, was injured on March 9, 1973, while engaged in employment covered by the Act. The claimant's duties consisted of loading and unloading cargo from trucks in a consolidation terminal or shed. This shed was 685 feet from the water and was used for receiving and dispatching cargo from trucks and for stuffing and stripping containers.

The claimant injured his knee and back when the load of another forklift swung and hit his knee knocking him to the floor. Claimant returned to work three months later and claims to continue to experience pain and physical limitation.

At the time of the injury, claimant was loading stripped cargo into trucks for further movement. These were the routine duties performed by the claimant as found by the administrative law judge.

The employer-carrier furnished medical services and paid compensation pursuant to the Maryland statute until claimant returned to work.

The administrative law judge found that the claimant was engaged in employment covered by the Act, as amended, and awarded compensation for temporary total disability and for 25 percent permanent partial disability to the right leg.

The employer-carrier have appealed alleging that the claimant was not engaged in the loading and unloading of vessels or in maritime employment; that the employer was not an "employer" within the definitions of the Act; that the injury did not occur on navigable waters as defined in the Act; and that the claimant, therefore, is not entitled to recovery under the provisions of the Act. They also appeal from the award of attorney's fee alleging it to be excessive.

The Board finds that the record supports the administrative law judge's findings that claimant's duties at the

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time of injury were loading cargo which was still in maritime commerce onto trucks for further trans-shipment.

We therefore look to the basic issues on appeal relating to whether the claimant was engaged in maritime employment and thus covered by the provisions of the Act.

Before the Act came into existence, longshoremen injured aboard a vessel were exempted from state compensation remedies while those injured on the pier, a then extension of the land, were protected. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Thereafter, in 1927 Congress enacted the Longshoremen's and Harbor Workers' Compensation Act to provide a compensation remedy to those longshoremen not covered by state laws, i.e. those injured upon navigable waters. This of course gave rise to inconsistencies depending on where a longshoreman was injured.

To further abolish the inequities of compensation coverage, Congress amended the Longshoremen's Act in 1972 to expand coverage to the land-based employees of the longshoring, shiprepairing and shipbuilding industries. Such amendments make it clear that injuries sustained on land, including "any adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel . . .," are to be included within the jurisdiction of the Act replacing the protection previously provided by state laws. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971).

The Board finds that the fact that cargo does not move directly between the ship and the shed is of no consequence in the determination of maritime employment. Although the record supports the finding that the claimant was involved in the process of loading and unloading vessels, such a conclusion was not essential. The claimant was performing the first and last tasks in a series of longshoring operations thereby bringing him within the scope of maritime employment. Maritime jurisdiction has long since

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been extended from the ship side of the water's edge to the dock, which was held to be within the scope of maritime law. *Gutierrez v. Waterman SS Corp.*, 373 U.S. 206 (1963).

The employer's position that it was performing two separate functions, one as a stevedore and the other as a warehouseman is irrelevant. The cargo with which the claimant worked on a routine basis was within maritime commerce. See *Mamiye Bros. v. Barber Steamship Lines, Inc.*, 241 F. Supp. 99 (S.D. N.Y. 1965), *aff'd*, 306 F.2d 774 (2d Cir. 1966), *cert. denied*, 385 U.S. 835 (1966). Therefore, both claimant and employer were engaged in maritime employment bringing both within the scope of the Act.

Finally, petitioners contend that the injury did not occur on an "adjoining area customarily used by an employer in loading, [or] unloading" a vessel. Having already concluded that the claimant was engaged in longshoring operations, the Board cannot narrowly construe "adjoining" to restrict the situs of an injury to an area immediately adjacent to navigable waters. Section 3(a) of the Act does not imply such a restricted interpretation:

any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining areas customarily used by an employer in loading, unloading, repairing, or building a vessel.

Moreover, the word "terminal" has been interpreted to include yards, storage facilities, stationhouses, platforms, and depots. *United States v. Knight*, 451 F.2d 275 (5th Cir. 1971). The Board finds that the shed, or consolidation terminal, in which the injury occurred is included within the scope of coverage of the amended Act whether considered as a terminal or adjoining area customarily used in the loading and unloading of vessels.

The Board finds that the petitioners have not established that the fee awarded to claimant's attorney in the amount of \$2,900 is excessive.

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The Board awards to claimant's attorney a fee of \$500 for services performed in defense of this appeal, such fee to be paid by the petitioners in addition to the compensation awarded and in a lump sum directly to said attorney.

The Board therefore affirms the decision and order appealed from.

s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

We Concur:

s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson
s/ JULIUS MILLER
Julius Miller, Member

Dated this 29th day
of November 1974.

**Decision and Order of Administrative Law Judge
(ALJ) Benn.**

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D.C. 20210

In the Matter of
WILLIAM T. ADKINS
Claimant

vs.

ITO CORPORATION OF BALTIMORE
Employer

LIBERTY MUTUAL INSURANCE Co.
Carrier

Case No.
74-LHCA-12
(Formerly 6670)

Issued: March 26, 1974

Before: HERMAN T. BENN
Administrative Law Judge

DECISION AND ORDER

This case is brought pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (hereinafter referred to as the Act) and the Rules and Regulations implementing the Act.

A hearing in this case was held on December 12, 1973, in the City of Baltimore, Maryland. The parties were represented by counsel and were afforded full opportunity to adduce evidence and to examine and cross-examine witnesses. Thereafter the parties filed briefs in support of their respective positions. Also the parties submitted

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additional documentary evidence subsequent to the hearing, including a medical report from Dr. Arthur Baitech dated January 9, 1974, which was offered by the Respondents; medical reports from Doctors Levine and Macht dated January 5 and 7, 1974, respectively; also counsel's petition for approval of a fee and statement with respect to disability are all hereby made a part of the record.

The court has given careful consideration to the entire record in this case; and based thereupon makes the following Findings of Fact, Conclusions of Law and Order:

Findings of Fact

1. The Claimant was 45 years of age at the time of the hearing. He resides with his wife and three daughters, and has a fifth grade education.
2. The Claimant was injured on March 9, 1973, while employed by the I.T.O. Corporation of Baltimore, Maryland, a stevedoring company, at the Dundalk Marine Terminal, which is now owned by the Maryland Port Administration of the Maryland Department of Transportation.
3. The said Employer was under contract at the time of the accident with the United States Lines (a marine shipping company) for loading and unloading vessels and a terminal contract to stuff and unstuff containers.
4. Containers were generally given one of four designations: house-to-house; house-to-pier; pier-to-house; or pier-to-pier movements.
5. Those containers designated house-to-house or pier-to-house were delivered directly to a trucking company or a warehouse outside of the terminal area and are handled by employees of the U. S. Lines, and not by the I.T.O. Corporation.

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6. The containers designated pier-to-pier or house-to-pier were required to be unpacked, unloaded, or "unstuffed" as is known in the trade. These containers would, after being unlashd on board ship, be picked up by a crane from their place of rest on the ship and placed on a wheeled chassis which is standing on the pier alongside the ship. A driver operates a vehicle, known in the trade as a hustler, takes the container on the chassis to the U. S. Lines marshaling lot and parks it there.

7. The container remains in the said marshaling lot until the said U.S. Lines Company advises the said I.T.O. Corporation that it desires a specified container to be unstuffed. At that time I.T.O. employees move the designated container to a consolidation terminal called the "shed."

8. The said shed, a portion of which is utilized by the said U.S. Lines for stuffing and unstuffing containers, also for receipt and dispatch of cargo discharged from and received in the said containers, is located about 685 feet back on land from the water's edge where the ships are docked at the pier.

9. The said sheds are constructed with numerous doors, said to be eleven or twelve, on the side facing the pier, and the same number on the opposite side. There is a ramp at each end by which vehicles may have access to the interior of the shed.

10. The incoming containers are unstuffed and the outgoing containers are stuffed at the side of the shed where the doors face the pier. The vehicles from which, and into which, incoming and outgoing cargo are loaded and unloaded use the doors on the opposite side of the shed.

11. There are several such sheds located in the said area known as Dundalk Marine Terminal. The said shed used

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by the U. S. Lines is designated shed eleven, and is sometimes called a consolidation warehouse. There is a position in the shed known as checker. The employee who holds this position checks the cargo to determine whether it is received or dispatched as ordered. The cargo in said shed is received and delivered on U.S. Lines delivery and receipt documents.

12. All of the work required in the above-described movement of cargo, from the unlatching of the containers from the ship to the discharge of the cargo from the shed, and the consolidation of the incoming cargo to be shipped by vessel, and stuffing of the containers with same, to the loading of the ship, is performed by the employees of the I.T.O. Corporation, under its said contracts with the said U.S. Lines Company. All of said employees are members of the International Longshoremen's Association, an AFL-CIO affiliate.

13. The Claimant was employed by I.T.O. as an operator of a fork lift. His major function was to assist in loading and unloading cargo which was being received and dispatched in and from the said shed. In addition thereto, he was called upon by his said employer at times, mostly on weekends and overtime, to operate said fork lift onboard ship in connection with loading and unloading same, and in stuffing and unstuffing containers.

14. A ship known as the American Legend arrived and docked at pier nine of the said Dundalk Marine Terminal at 7:45 A.M. on March 2, 1973. The cargo designated for said terminal was unloaded and the said ship departed the same date at 10:28 P.M.

15. The cargo which was unloaded from said ship was incased in containers which after being discharged from

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the ship were taken to the storage area of the U.S. Lines terminal yard sometimes called the marshaling area. On March 5th one of the containers which had included in its cargo some brass tubing was taken to the said shed eleven, some one thousand feet from its place of rest in the said marshaling area, and its cargo stripped or unloaded and placed in the shed.

16. On March 9, 1973, the Claimant, Mr. William T. Adkins, was assigned to work with a checker in receiving and delivering cargo which was being brought into shed eleven by trucks for shipment by the U.S. Lines' vessels, and loading cargo which had been brought in by vessels in containers which, after being stripped, was being dispatched from shed eleven for further movement. The Claimant stepped down from the fork lift which he was operating and placed a "chock" under some "freight" in order that the blade of the fork lift could be moved under the same. Another fork lift operator backed up and the freight which was being carried by the second operator began to swing toward the Claimant and he shoved it back against a truck tire. The freight, which weighed about four hundred pounds, bounced off the Claimant's right leg breaking it at the knee area and injuring his lower back as he was knocked to the cement floor. He was taken to City Hospital in Baltimore, Maryland, where he remained about six days, and was placed in traction and a cast. He returned to his same job as fork lift operator after about three months. He continues to experience some pain and physical limitation.

17. Subsequent to the injury a claim was filed with the Workmen's Compensation Commission of the State of Maryland. Pursuant to same medical services were furnished, and compensation was paid Claimant for temporary total disability under the Maryland Statute until he returned to work.

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18. The Claimant takes the position that the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended by Congress in 1972, extends coverage to include his job as described above, and that the Claimant has a permanent partial disability.

19. The Respondents controvert the said position of the Claimant, and takes the position that the job performed by the Claimant is covered only by the State of Maryland's Workmen's Compensation Statute, and that he has no residual "disability," as that term is contemplated under workmen's compensation statutes.

20. The issues thus raised are whether the provisions of the Act, as amended, cover the Claimant, and if so, the extent of his "disability" as that term is contemplated under the Act.

Opinion

At the outset we are confronted with the jurisdictional issue bearing on the extent to which longshore work performed on land is covered, under the provisions of the Act, as amended in 1972. This case appears to be one of first impression on this issue.

In the interpretation of a statute, the courts look diligently for the intention of the legislative body, as expressed in the words of the statute, keeping in view at all times, the old law, the evil, and the remedies. See *Camineth v. United States*, 37 Sup. Ct. Rep. 192; *Nacirema Co. v. Johnson*, 396 U.S. 212.

The terms of the statute here involved as it was passed by Congress on March 4, 1927, and prior to being amended in 1972, 33 U.S.C. 903(a) are, in pertinent part, as follows:

"Compensation shall be payable under this Act in re-

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spect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law"

By way of background, ten years before Congress passed the Longshoremen's Act of 1927 the United States Supreme Court decided *Southern Pacific Co. v. Jensen*, 244 U.S. 205. The major thrust of this case was to the effect that a State was without power to extend a compensation remedy to a longshoreman injured on the gangplank between the ship and the pier. The decision left longshoremen injured on the seaward side of the pier without a compensation remedy, while longshoremen injured on the pier enjoyed the protection of state compensation acts. See *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263. This left the longshoremen working aboard ships on navigable waters of the United States without compensation remedy, Federal or State.

Twice Congress attempted to fill this gap by passing legislation that would have extended state compensation remedies beyond the line drawn in *Jensen, supra*. Each time the Court struck down the statute as an unlawful delegation of congressional power. See *Washington v. Dawson & Co.*, 264 U.S. 219; and *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149.

Finally, Congress determined that what it could not empower the States to do, it could do itself—it passed the Longshoremen's Act of 1927. This Act extended a compensation remedy to workmen injured beyond the pier and hence beyond the jurisdiction of the States. This purpose was clearly expressed in the language limiting coverage

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to injuries occurring "upon the navigable waters," and permitting recovery only "if recovery . . . through workmen's compensation proceedings may not validly be provided by State law."

The Supreme Court of the United States interpreted the above language of the 1927 Act as terminating the coverage of compensation with respect to federal jurisdiction at the water's edge. Longshoremen working on the pier or a platform permanently attached thereto were left to the mercy of the various state legislatures. See *Nacirema v. Johnson, supra*.

One of the evils of this resulting situation was the lack of uniform compensation. Depending on which side of the water's edge the longshoreman happened to be working when he was involved in an accidental injury, and what state he happen to be working if on the land side of the water's edge.

It has been held that the purpose of including all cases of admiralty and maritime jurisdiction within the federal judicial power was to insure a body of maritime law which should, so far as its characteristic features were concerned be uniform throughout the United States. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149; 11 A.L.R. 1145.

It has, accordingly, been decided that Congress may not modify the general maritime law as to save to persons injured in the course of maritime employment the rights and remedies available under the workmen's compensation acts of the states in which the injuries occur. See *Knickerbocker, supra*; also *State of Washington v. W. C. Dawson & Co.*, 264 U.S. 219; and 25 A.L.R. 1008.

The following comment is included at page 75 in the Legislative History Of The Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972 which was prepared by the Subcommittee on Labor of the Com-

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mittee on Labor and Public Welfare of the United States Senate:

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel."

Consideration will now be given to the language of the said coverage section of the Act as amended in 1972, which is, in pertinent part, as follows:

"Composition (sec) (Compensation) shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, maritime railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). . . ."

A review of the facts in this case reveals that the cargo of copper tubing involved in the injury here was moved by employees of I.T.O. Corporation, which was under a stevedoring contract with the United States Lines, a marine shipping company, to load and unload vessels. The said

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cargo arrived on the vessel American Legend, and the said employees unlatched the container and moved it from the vessel to areas specifically stated in the said statute, including the adjoining pier or wharf, other adjoining area, and terminal.

The Respondents place great stress on the word in the statute "adjoining" placing thereupon the restricted meaning of "connecting" which, in fact, is one of its meaning. However it also means, according to Webster's New Word Dictionary, "neighboring," and when used as such does not necessarily connote being physically connected.

The word terminal has been defined by the courts as including yards, docks, storage facilities, station houses, platforms and depots. *United States v. Knight*, 451 F. 2d 275; *United States v. Spatuzza*, 379 U.S. 829, 331 F. 2d 214.

Terminal has also been defined as "either end of a carrier line." *Beazley v. DeKalb County*, 77 S.E. 2nd 740. The court in *Pilot Freight Carriers, Inc. v. Scheidt*, 140 S.E. 2nd 383 stated the following with respect to "terminals":

"Orderly and economical transportation of many relatively small shipments necessitates the establishment of a warehouse, at some convenient point or points, where different shipments destined for the same terminal point can be assembled and loaded in one vehicle. These assembly points are in carrier terminology known as 'terminals.'"

The use of containers in shipping freight by vessels is a modern and comparatively recent means of maritime shipment. It can be readily seen that it may greatly simplify and at the same time reduce the time required to move the freight from pier to ship and from ship to pier. However, at least in handling those containers designated pier to pier, and house to pier, the result is to require more of

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the longshoremen's time and effort in moving the freight in the container to the marshaling area, from there to the "shed" or "terminal," stuffing and unstuffing the containers, and dispatching the freight. The above-stated handling of the maritime cargo constitutes an essential part of the loading and unloading process with respect to shipment by vessels, especially as it pertains to containerized cargo. The "shed" or terminal being at one and the same time the beginning and end of the maritime movement. The meaning of the word "terminal" here, which is a critical term in the Act, under the facts of this case, is not only based on its common and usual usage, and the meaning placed on it by the courts, but also by means of *noscitur a sociis*.

The Claimant places much stress upon the fact that he was employed as a longshoreman, and as such was a member of a local union designated as 333 which is an affiliate of the International Longshoremen's Association. However, a name given a harbor worker does not determine his rights to benefits under the Act. The distinguishing factor is the type of work that the injured party was performing. *Olvera v. Michalos*, 307 F. Supp. 9. The evidence with respect to the work performed by the Claimant herein includes operating his fork lift in the said terminal building mainly removing cargo to vehicles to be taken out and receiving cargo for maritime shipment. He also helped to stuff and unstuff containers, and worked on board ship with his said vehicle in connection with loading and unloading cargo. The last two duties were mostly performed on overtime. The definitions of "employee" and "employer," as contemplated under the Act, are set out in Section 2, subparagraphs (3) and (4) of the Act and are as follows:

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or

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other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel."

The evidence establishes that both the employee and employer in this case fall within the above definitions, respectively. The court concludes therefore that the Act, as amended, extends its coverage of longshore and harbor workers from the water's edge, where the coverage ended under the Act prior to the 1972 Amendments to the discharging of the cargo from the terminal, also known as shed eleven. Thus the Claimant's work at the time of his said accidental injury is within the protective provisions of the Act, as amended in 1972.

Consideration will now be given to the issue of the extent of "disability," as that term is contemplated under the Act, which the Claimant has suffered.

The evidence establishes that the said injury involved herein occurred on March 9, 1973. Diagnoses indicate that the Claimant suffered a comminuted fracture of the upper end of the tibia just below (illegible) joint. There is a small anterior and posterior fragment of bone displaced downwards. There is a large amount of callus and new bone formation present. He also suffered a musculo-ligamentous sprain of his back.

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There has been a maximum improvement attained with a residual 25 percent permanent partial loss of use of the right leg, and up to 15 percent of his back.

The Claimant's loss of time from work as a result of the said injury was from March 10 to June 3, 1973.

The evidence establishes further that the Claimant filed for and was paid workmen's compensation under the workmen's compensation statute of the State of Maryland. However, acceptance by such an employee of such payments under a state act does not constitute an election which precludes recovery under the Federal Act. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 119.

It was stipulated by the parties and the court finds that the Claimant's average weekly wage at the time of the said injury was \$284.33.

The evidence establishes that the Claimant returned to his former job, performing his former work of fork lift operator and there is no evidence that his post-injury earning capacity has been adversely affected. The Act does not permit the award of compensation for permanent partial disability aside from scheduled disability unless there has been some loss of wage-earning capacity shown. *Owens v. Traynor*, 274 F. Supp. 770.

The court finds that the Claimant is entitled, under Section 8(b) of the Act (33 U.S.C. 908(b)), to compensation for temporary total disability. Also to compensation for 25 percent permanent partial loss of use of his right leg under Section 8(c)(2) and (19) of the Act (33 U.S.C. 908 (c), (2) and (19)).

The court further finds that the Claimant is entitled to medical benefits pursuant to Section 7 of the Act.

As it appears that this case presents an issue of first impression for decision, the court concludes that justice would

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best be served by not awarding interest on past due benefits. However the approved counsel fee is assessed against the Respondents pursuant to Section 28(a) of the Act.

Upon the foregoing findings and conclusions, the court makes the following:

Order

1. The Employer/Carrier shall pay to the Claimant compensation for temporary total disability pursuant to Section 8(b) of the Act (33 U.S.C. 908(b)), for the period commencing March 10, 1973 through June 3, 1973, less any sum paid pursuant to the Workmens' Compensation Act of the State of Maryland.
2. The Employer/Carrier shall pay to the Claimant compensation for permanent partial scheduled disability for 25 percent loss of use of his right leg.
3. The Employer/Carrier shall pay the medical expenses in connection with the said injury pursuant to Section 7 of the Act (33 U.S.C. 907), including \$50.00 to Allan H. Macht, M.D., 2 East Read Street, Baltimore, Maryland 21202, and \$55.00 to Stuart C. Levine, M.D., 507 Latrose Building, 2 East Read Street, Baltimore, Maryland 21202.
4. The Employer/Carrier shall pay to Amos I. Meyers, Esq. the sum of \$2,900.00 for legal services rendered in connection with this case. Said sum shall constitute a lien against the said benefits due the Claimant pursuant to Section 28(c) of the Act (33 U.S.C. 928(a)).

s/ HERBERT T. BENN
HERMAN T. BENN
Administrative Law Judge

Dated: March 26, 1974
Washington, D. C.